JUDICIAL REVIEW OF VETERANS' CLAIMS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

JULY 21 AND JULY 26, 1983

Printed for the use of the Committee on Veterans' Affairs

Serial No. 98-25

U.S. GOVERNMENT PRINTING OFFICE
25-550 O WASHINGTON : 1983

H761-29

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JUDICIAL REVIEW OF VETERANS' CLAIMS

THURSDAY, JULY 21, 1983

House of Representatives,
Subcommittee on Oversight and Investigations,
Committee on Veterans' Affairs,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9 a.m., in room 334, Cannon House Office Building, Hon. G. V. (Sonny) Montgomery (chairman of the subcommittee) presiding.

Present: Representatives Montgomery, Edwards, Penny, Staggers, Rowland, Evans, Hillis, Solomon, and Johnson.

Also present: Representatives Edgar and Kaptur, members of the full Committee on Veterans' Affairs.

OPENING STATEMENT OF CHAIRMAN MONTGOMERY

Mr. Montgomery. Good morning. The subcommittee will come to order and I thank my colleagues for being here and being here on time. We're proud of the fact that on this committee and our subcommittees we do try to start our hearings and meetings on time. As you know, we are here today on judicial review of veterans' claims for veterans' benefits.

Under section 211 of the title 38 of U.S. code, it states that:

> The decision of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court in the United States shall have the power or jurisdiction to review any of these decisions.

We know that there are arguments which support retention of the current review process and also there are arguments which call for judicial review. This issue is far from simple. I would like to ask unanimous consent that my full statement be put in the record.[1]

The Chair would like to recognize Mr. Hillis, the ranking minority member on this subcommittee.

OPENING STATEMENT OF HON. ELWOOD HILLIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. Hillis. Thank you, Mr. Chairman. The hearing this morning will focus on an issue that is of considerable concern to the committee. For years the subject of judicial review of veterans' claims has been before us and it's a subject of considerable debate ranging from suggested simplistic reasons for creating court review to strong opposition to any change whatsoever in the status quo.

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[1] The statement of Chairman Montgomery appears on p. 89.

The idea of a right to a day in court seems to be supreme in the eyes of the principal advocates of judicial review and the idea of clogging the Federal courts, increased costs, creating a new bureaucracy, establishing adversary roles between the Government and the veteran in the adjudication of veterans' claims is the argument made against it.

This morning we will undoubtedly hear more details of both these opposing sides. Our witnesses are individuals who are well-versed on this matter and I look forward to hearing from all of them.

Mr. MONTGOMERY. Thank you, Mr. Hillis.

I would like to thank Mr. Solomon of New York for being here this morning and my close personal friend and the ranking majority member on this side of the aisle, Mr. Don Edwards, who requested me, as chairman, to have these hearings. I would like to recognize Don Edwards at this time and also ask Don if he would introduce our distinguished first witness this morning.

STATEMENT OF HON. DON EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. EDWARDS. Thank you very much, Mr. Chairman. I do thank you for scheduling this important hearing. As you know, I have been, for a long time, a supporter of judicial review. I believe that the veterans of this country are entitled to the same rights enjoyed by our other citizens under the Constitution and these rights include the due process of law. Under current law our veterans are denied that basic due process right. They lack any right to appeal to the courts for any decision made within the Veterans' Administration; and so, on March 8 of this year I again introduced legislation to correct this inequity and I would like to enter for the record of this hearing the language of that bill, H.R. 1959 [1] and the section-by-section analysis of the bill.[2]

Mr. MONTGOMERY. Without objection, so ordered.

Mr. EDWARDS. Thank you, Mr. Chairman. Legislation very similar to H.R. 1959 passed the Senate on June 15, 1983, as it has in the 96th and 97th Congresses. I am absolutely delighted that my Senator, my personal Senator from California, the most distinguished Senator from the Golden State, has been able to join us here. He is not only my distinguished Senator, but he's a friend of many, many years.

Senator Cranston, Mr. Chairman, as you know, in the Senate has been in the forefront of the struggle to obtain for veterans this fundamental right of citizenry.

Alan, I welcome you with great pleasure and I speak for all of my colleagues and we are all looking forward to your testimony this morning.

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[1] See p. 90.
[2] See p. 117.

STATEMENT OF SENATOR ALAN CRANSTON, RANKING MINORITY MEMBER OF THE SENATE COMMITTEE ON VETERANS' AFFAIRS

Senator CRANSTON. Thank you, Don. I appreciate very, very much that generous introduction and your own good work and your friendship over so many years.

Mr. Chairman, I thank you very much for this opportunity and I thank the members of the committee for their presence.

As a strong, long-time supporter of legislation to provide for judicial review of VA decisions denying claims for veterans, I am delighted to appear before this subcommittee this morning and I congratulate you, Mr. Chairman, for scheduling this hearing and I thank you for this opportunity to testify.

My statement will be rather brief. I have a longer statement that I ask appear in the hearing record.

Mr. MONTGOMERY. Without objection.[1]

Senator CRANSTON. Thank you.

I want to note the strong interest in this issue of my good friend and colleague from California, Don Edwards, who has introduced legislation pending before your committee.

As you all know, the Senate Veterans' Affairs Committee reported S. 636 on May 18 and it was passed by the Senate on June 15. I urge your full and careful consideration of this legislation which is the product of refinements by our committee over four Congresses.

In my view, finding fault with the current system is not a necessary step in making the case for a judicial review. Rather, I believe that appropriate first question is whether there is any continuing reason—putting to one side the question of whether there ever was a valid reason—for denying veterans the same right of access to court review of VA benefit decisions that is available in the case of virtually every other Federal benefit.

When the issue is posed as, "Why should veterans be denied rights available to others in their dealings with the Federal Government," I have never heard a satisfactory answer justifying maintaining the current law preclusion.

I realize that concerns have been expressed that judicial review would have an undue impact on the agency's current claims adjudication processes. I have also heard concerns that providing for judicial review could make the VA claims process more adversarial and that it would create unnecessary delay and would cost veterans money in the form of attorney's fees.

Although I fully recognize the genuineness of these concerns, I do not believe that any of them are well-founded.

It is possible that providing for judicial review and doing nothing else could have an untoward effect on the current VA system. However, the legislation that has been developed in the Senate contains numerous provisions that have been designed expressly to avoid that result. These provisions in S. 636 would insure that, to the extent feasible, the VA's desirable adjudication practices and procedures would be protected by providing a statutory basis for them.

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[1] The prepared statement of Senator Alan Cranston appears on p. 124.

With reference to the concerns about judicial review causing undue delay or about it somehow making the veteran and the agency adversaries, it's important to remember that under S. 636 judicial review would be available only after a veteran's claim had been turned down by the regional office and on appeal by the Board of Veterans' Appeals.

At that point it is difficult to see how providing for judicial review would create any delay. The VA proceedings would have run their normal course. A process no longer going anywhere really cannot be delayed. Moreover, a veteran whose claim has been finally denied upon appeal would not become an adversary of the VA by virtue of having court review available.

Regarding attorney's fees, it's almost incomprehensible to me—in fact, it is incomprehensible—that the $10 limit has survived to this time. Whatever behavior characterized the legal profession following the Civil War, it is no longer credible to insist that attorneys would prey on innocent veterans. I also am unable to accept the view that veterans, as a class, are so unable to protect themselves that there needs to be a barrier erected in law between them and attorneys.

I also note that S. 636 would not lift the $10 limit until after the veteran has received an initial BVA decision.

With respect to the impact on the Federal judiciary, I do not understand why veterans and others with claims before the VA should continue to be discriminated against and denied important rights because treating them fairly might enlarge the responsibility of the court system. If the Federal courts are overburdened, the Congress should address that problem on an equitable basis by expanding available resources or limiting access to court on some basis that applies to all citizens.

It is blatantly unfair and it is arbitrary to deal with perceived problems in the court by singling out veterans for exclusion with respect to benefits earned by service in the military.

In terms of positive reasons for judicial review legislation, I believe the general reasons outlined in my 1980 testimony before this subcommittee—insuring fairness to individual claimants and providing the basis for a review of questionable VA actions restricting benefits—continue to be valid.

I am particularly concerned about the need for veterans to be able to challenge general agency decisions and practices restricting, withholding, or withdrawing VA benefits. There have been numerous examples of such actions in the recent past which I describe on page 3 of my full statement.

Although our two committees do our utmost to oversee the activities of the VA, our limited resources do not allow us to review fully and act to resolve satisfactorily all of the issues arising in such a large and complex agency. We are legislative bodies. We cannot effectively be the courts of last resort.

Rather, the remedy should be one of outside review by the independent branch of Government established in our constitutional framework with the special responsibility of determining whether governmental action is lawful and fundamentally fair. This would mean that the VA would have its processes subjected to appropriate scrutiny, and where the agency's actions were upheld, it would be vindicated. Likewise, to the extent that the agency's actions were held unlawful or fundamentally unfair, remedial steps could be taken to insure that the agency was meeting its responsibilities fully.

The VA recently testified to our committee that there was no need for legislation in this area because of a general trend in court decisions permitting veterans to challenge VA regulations. I do not agree with this analysis for two important reasons. First, the court decisions on this point have varied from one court of appeals to another. A clear legislative resolution, as in S. 636 would eliminate any confusion and any difference in result.

Second, despite the VA's acknowledgement that some courts of appeals clearly have allowed veterans to bring actions challenging the VA regulations on other than constitutional grounds, the U.S. Government continues to raise the title 38 statutory bar to judicial review in VA cases which do not, and I emphasize "not," involve individual claims for benefits.

Again, a clearly statutory basis for judicial review would end this disingenuous practice and the confusion that it engenders.

One additional point: I believe it is vital that whatever scope of review is chosen must provide some basis for court review of questions of fact. S. 636 includes a very narrow scope of review of factual issues, providing such a very narrow base for factual review by a court not only reaffirms the BVA's role as the expert final arbiter of such questions, but also would afford an opportunity for correction of truly egregious decisions on questions of fact.

Although I believe such decisions are rare, I do not believe that total preclusion of review of facts would be appropriate or productive.

Again, Sonny, please accept my thanks for the opportunity to appear before you on this very important issue. I look forward to continuing to work with you and all of the members of the committee on this and on other matters.

Mr. Chairman, I am scheduled to appear at another committee on the Senate side at 9:30 and then attend a Veterans' Affairs Committee markup at 10 a.m. I regret that because of that I will be unable to stay here. Should any members of the subcommittee have any questions on my statement or any aspect of S. 636, I would be pleased to respond in writing.

Mr. MONTGOMERY. Thank you very much, Alan. Let me say that I have always thought of you in the Senate as "Mr. Veteran" and I have certainly enjoyed working with you over the years when you were chairman of the full Committee on Veterans' Affairs and since you have been the ranking minority member over there.

I also want to thank you—as we all know, you are running for the highest office in the land—that you would take the time to come here and testify before this subcommittee on an issue that you feel so strongly about. I would like to welcome Jon Steinberg, a member of your staff who has been most helpful to us over the years working on legislative matters.

If any member would like to make a brief comment and then we will let you go, Senator.

Any other comments?

Mr. **Edwards**. Thank you, Mr. Chairman. I would just like to tell Senator Cranston that I have read his full statement and it certainly answers any questions that I think anybody will have. It's really a splendid statement.

Senator **Cranston**. I have given you an overwhelming case for affirmative action and I thank you very, very much and I appreciate your very generous and thoughtful words.

Thank you all very much.

Mr. **Montgomery**. Thank you, Senator.

John, why don't you come to the witness stand. Senator Gary Hart asked to be heard, but he's not able to get here this morning. Without objection, his statement will be put in this record.[1]

We are very glad to have our good friend John LaFalce who is a very able Representative from the 32d District of New York and John, you may proceed. Your full statement will be put in the record, without objection, and we are very glad to have you with us this morning.

STATEMENT OF HON. JOHN LaFALCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. **LaFalce**. Thank you very much, Mr. Chairman, for inviting me to testify. I am honored to appear before this subcommittee. I think before I testify though I must disclaim some of the rumors that have been evident in the past few days or so. Despite the fact that Senator Cranston has testified and that Senator Hart was scheduled to testify and I am scheduled to testify, I am not a candidate for the U.S. Presidency. I just wanted you to know that.

Mr. **Montgomery**. Well, let the record show that.

Mr. **LaFalce**. I have made Mr. Solomon's day. He was awfully worried there for a while.

Mr. Chairman, every American who believes that he or she has been unfairly judged by a court of law or by a Federal administrative agency is entitled to judicial review of the court order or administrative decision, every American except veterans dealing with the Veterans' Administration.

Veterans, Americans who have fought and served to protect and defend the Constitution, are denied that basic constitutional right of due process when dealing with the Veterans' Administration.

I introduced a bill during the previous Congress, H.R. 1331, to correct this glaring inequity and I have reintroduced it again during this Congress, H.R. 3300. In each instance, not only for myself, but also on behalf of the Vietnam-Era Veterans in Congress Caucus, and I am here testifying in their stead today.

I would like to especially recognize the efforts of our colleague from California, Don Edwards, a member of this subcommittee, who introduced very similar legislation, H.R. 1959, to provide for such judicial review. I welcome his leadership on this issue.

Our bills are designed to redress a grievous wrong that has been perpetrated on veterans for the past 50 years. Veterans who believe that the VA has wrongfully or illegally denied them the disability compensation which they earned, and to which they are entitled by law, are denied the right to appeal their cases to a fair and impartial court of law.

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[1] The statement of Senator Hart appears on p. 128.

When individuals are angered by a court decision, Mr. Chairman, or an administrative order, we often hear them give the retort, "I am going to fight this all the way to the Supreme Court."

Now we know that the Supreme Court hears very few cases every year. The probability of it hearing any given case is remote, but the ability to appeal to a higher authority, in this case, the highest court in the land, is a fundamental right enjoyed by all Americans. It carries with it not only a procedural safeguard against the abuse of judicial and administrative power, but also a symbolic value that is fundamental to the definition of our democracy.

Veterans who feel that they have been unjustly denied compensation benefits, however, enjoy no such safeguard. They enjoy no such symbolic reward. For the veteran there is no right to appeal VA determinations "all the way to the Supreme Court." Indeed, there is no right to appeal VA decisions to any court.

Veterans are also effectively denied the right to hire an attorney to represent them in their cases before the VA's compensation bureaucracy. Present law makes it a crime for an attorney to charge a veteran more than $10 for total services rendered in the veteran's case. I would like to ask the members of this subcommittee who are lawyers and who have practiced law before being elected to Congress, "How many cases they handled for $10?" I would like to, but I don't have to. I think we know the answer. The cost of preparing such a claim would far exceed $10, frightening away all but the most altruistic amongst us.

Veterans are also denied the protection of the Administrative Procedures Act. This law, enacted in 1946, was designed to protect the rights of Americans from being violated by agencies of the Federal Government. As the Government has grown, the need for these protections has grown. Every Member of this body plays an ombudsman role for his constituents. We look after social security checks that are not delivered. We help our constituents and their families in foreign countries with immigration matters. We track down refund checks from the IRS. And, we make sure medicare benefits are promptly paid.

But most of all it is our duty to make sure that our constituents are afforded every available safeguard when dealing with the Federal bureaucracy. In this regard, Mr. Chairman, we have failed our veterans who are, by law, denied these basic protections.

I am here today to suggest to this subcommittee that it is time to change our ways. It is time to bring our veterans under the broad umbrella of constitutional and statutory protections that shield every other American from the arbitrary and capricious decisions of the Federal bureaucracy.

The House has been remiss in this regard. On several occasions our colleagues in the Senate have passed veterans' judicial review legislation and we have failed to follow their lead.

Most recently, the Senate on June 15 passed Senator Hart's judicial review bill, S. 636, as a substitute for a House-passed bill, H.R. 2936, that would expand the size of the VA's Board of Veterans' Appeals. We now have an opportunity to accept the Senate-passed measure or to consider bills that have been introduced in the House.

Before outlining the approach that I would take in H.R. 3300 let me say that if the Veterans' Affairs Committee were to accept the Senate-passed language in conference, I would be delighted to support that.

My bill and the bill introduced by Representative Edwards are worthy substitutes, but in this instance, the need to act far outweighs any pride of authorship. Nonetheless, I would suggest, that H.R. 3300 does contain several provisions that should be included in veterans' judicial review legislation, including provisions to codify, for VA adjudication purposes, the burden of proof and reasonable doubt standard currently provided for by VA regulation; establish that if an approximate balance of positive and negative exists regarding the merits of a claim, the VA is to resolve such doubt in favor of the claimant; increase the size of the Board of Veterans' Appeals from 50 to 65; require that the Board provide notice to a claimant that an opportunity for a rehearing before a decision may be based on new evidence; remove the current requirement that new material that will allow the Board to reopen a previously denied claim be in the form of official reports; and establish new procedural rules for adjudication regarding admissibility of evidence, procedural rights of claimants, and the right of a claimant to obtain and examine a copy of the hearing record.

All of those are important provisions that should be included. But there are also provisions of H.R. 3300 that I think must be included in any legislation.

First, the VA's rulemaking procedures must be included under the provisions of the Administrative Procedures Act. Second, allowable attorney's fees must be reasonable so that veterans can be fully represented by legal counsel before the VA. I don't wish to downgrade the quality or the value of the service performed by veterans' organizations in providing technical assistance to veterans. It's great. The free service is invaluable in stepping the veteran through the VA's bureaucratic maze, but it's not legal counsel. If we are to give veterans access to the courts, I believe we must increase the $10 limitation on legal fees. H.R. 3300 would raise the limit to $500 and allow for additional fees in extraordinary cases.

Finally, and of course, the very heart of the matter, is providing for judicial review of VA decisions in the Federal court system. It doesn't have to be unlimited nor unbridled. Judicial review of a final decision should be sought within 180 days of the Veterans Appeals Board mailing of the notice of its decision. The bill would also provide that the court may decide questions of law and interpret constitutional and regulatory provisions but that questions of fact will not be subject to any de novo trial. These are reasonable limitations.

They are also consistent with the rights and privileges enjoyed by all other Americans when appealing administrative decisions to the courts.

Mr. Chairman, I would like to close my testimony by noting that advocates of judicial review of veterans' claims decisions do not view the VA as an adversary. We are cognizant of the VA's attempts to provide a nonconfrontational forum to resolve disputes.

We are also cognizant of the VA's pronounced policy of bending over backward to meet legitimate claims. But anyone who lends an ear to veterans, who believe that they have been wrongly judged by the VA, knows that even the VA makes mistakes. Veterans must be afforded the opportunity, the right, to have their grievances aired in a court of law. We have taken this right away from those who fought and served to protect the Constitution of the United States and we have suffered this injustice for far too long.

I hope that this morning's hearings will provide the impetus that is needed to extend the constitutional protection of due process of law to America's veterans. If we do not fully restore to those who served, how can we expect, how can we ask others to serve to protect and defend the Constitution?

It seems to me that there is a mutual bargain and it's time for the U.S. Congress to fulfill our part of that bargain. I hope that this subcommittee and its parent committee that you chair will give us that opportunity.

I thank you very much.

[The prepared statement of Congressman LaFalce appears on p. 130.]

Mr. MONTGOMERY. Thank you very much, John.

Mr. LAFALCE. Mr. Chairman.

Mr. MONTGOMERY. Yes.

Mr. LAFALCE. I hate to make the same reservation that Senator Cranston did, but I am scheduled to give a speech in Baltimore at 10 o'clock. With your permission, I would like to answer any questions in writing.

Mr. MONTGOMERY. We don't really have a lot of problems with that. We have a lot of witnesses and we'll have some votes on the floor. Thank you very much. If any member would like to make a quick comment.

Mr. EDWARDS. Thank you, Mr. Chairman. The only problem is I hope Mr. LaFalce has a helicopter or something.

Mr. LAFALCE. We are going to be a little late, but they are on notice.

Mr. EDWARDS. That was really a fine statement and we appreciate it.

Mr. SOLOMON. Would the chairman yield?

Mr. MONTGOMERY. Yes.

Mr. SOLOMON. I would just like to pose a question: Is it a political speech, because if it is we will keep you here for a little while, John.

Mr. LAFALCE. I have never given a political speech in my life, Jerry. [Laughter.]

Mr. SOLOMON. May I just say one word on behalf of John LaFalce. You know, we are of the opposite political persuasion and we disagree on a lot of things at times. I served with John in the State legislature and in the Congress here, and I feel compelled to laud him because of his long-standing commitment to veterans. John, we appreciate your testimony this morning.

Mr. LAFALCE. Thanks very much.

Mr. MONTGOMERY. Thank you.

Our next witness will be the Honorable Carolyn Kuhl, Deputy Assistant Attorney General, Civil Division, Department of Justice.

We would like to welcome you and your full statement will be entered in the record. If you could summarize your statement, it would certainly help the committee.

STATEMENT OF CAROLYN B. KUHL, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Ms. KUHL. Good morning, Mr. Chairman.

Mr. MONTGOMERY. Good morning.

Ms. KUHL. I would be glad to summarize my statement and I appreciate very much the opportunity to appear here before the subcommittee this morning to present the views of the Justice Department on proposals to create a right of judicial review for veterans' benefits determinations.

Especially when dealing with the administrative adjudicatory process, I think there is much truth in the old addage that if the system isn't broken, don't fix it. It has been noted in prior years and I don't think that it has been refuted here this morning that there really is no proof of fundamental unfairness in the present system. In the 96th Congress which considered a bill to supply judicial review in this area, a committee report stated that the decision to consider legislation was not based on the belief that the current system, resulting in a final unappealable decision being made by the Board of Veterans' Appeals, results in widespread unjustices. To the contrary, the committee report stated, "There is no evidence that most claimants are not satisfied with the resolution of their claim for VA benefits."

I would add to this that to the extent there are cases of individual dissatisfaction with the VA process or with the result of that process, litigants in the court system are also often dissatisfied with the individual result of that process.

We would suggest, therefore, that there has not been a showing of sufficient problems created by the present system to require adding additional layers of review. If there are specific problems with certain kinds of decisions made by the Veterans' Administration, the better course would be to deal directly with those problems by legislation, not to seek to solve them indirectly by passing responsibility to the courts.

Second, I would like to note that trying to, "fix," the present system by adding a superstructure of judicial review will cause problems for an overburdened judiciary and we believe it will inevitably introduce an element of unfairness into the process of adjudicating veterans' benefit claims.

One of the purposes of precluding judicial review has been to insure uniformity in the adjudication of complex technical issues. If judicial review is instituted, uniformity will be lost. It is inevitable that the many district courts and the 12 circuit courts of appeals will reach different conclusions on the technical legal or factual and medical issues. Resolution of these inconsistencies breeds litigation to the expense of claimants, the VA, the Justice Department, and the judiciary.

One of the chief objectives of a benefit review system and a hallmark of fairness is uniformity of result. Judicial review would take the system further away from that objective. In the social security disability benefits area, inconsistencies created by the judicial review process have, in turn, created high reversal rates at each layer of review, both within the administrative system and within the court system. A high reversal rate then becomes its own reason to litigate through many layers. Thus, the system also has an element of unpredictability.

In addition, it seems inevitable that the nonadversary character of the present benefit adjudication system will be lost, at least to some extent. As claimants' lawyers are introduced into the process, not only at the court level, but also, no doubt, in the administrative process, the Veterans' Administration's present role of assisting the claimant in the process is bound to change.

As for the problems of an overloaded judiciary, the Chief Justice, among others, has repeated again and again, and increasingly in recent months, that the courts have taken on increasingly crowded calendars and that thereby the delivery of justice has become slower and the quality of the decisionmaking process has declined. It is only realistic to expect that veterans' benefits claims cases will not take precedence on a court's calendar in terms of the resources expended. This is especially so because the legal issues will be unfamiliar to the courts and the records will be fact-bound. Many social security benefits claims are dealt with, in the main, by magistrates in the district court system.

I would like to add one final note, Mr. Chairman. We have included in our testimony an estimate prepared in 1978 of the likely cost of judicial review in terms of the Justice Department's resources. The Justice Department's Justice Management Division is updating that cost estimate and if the chairman would consent to keeping the record open, we would like to supplement the record with these updated cost estimates when they are available, hopefully in the near future.

Mr. MONTGOMERY. Without objection.[1]

Ms. KUHL. Thank you, Mr. Chairman. At this time I would be happy to answer any questions that any of you have.

The prepared statement of Ms. Kuhl appears on p. 138.]

Mr. MONTGOMERY. Thank you, Ms. Kuhl, for your testimony and for your brevity and for coming right to the main issues of judicial review.

Let me just say, without objection, the Chair will recognize members who would like to ask questions and will not go down the list this morning, in trying to get all the witnesses, if we can. So anyone would like to ask Ms. Kuhl a question or make some comments, the Chair will recognize that individual.

Mr. Hillis.

Mr. HILLIS. Thank you, Mr. Chairman. I have a couple of questions. I think that there are many questions that could be asked in this whole area, but let me begin by asking, do you see judicial review, if it were to be enacted by Congress in this area, as placing the Federal Government and the veteran claimant in an adversary position?

Ms. KUHL. Yes, I certainly do. That is inevitable in the court system and we believe that in introducing that adversary relationship at the court level, it inevitably is going to affect the way all sides in the litigation approach the administrative process as well.

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[1] See p. 146.

Mr. HILLIS. Well, in time, would we not see then the development of precedents, in other words, decisions in a claim almost identical to other claims then would be binding in judicial circuits and in some instances across the country? In other words, we would have a whole new field, would we not, and all of the problems that sometimes result in conflicts between jurisdictions and circuits and that sort of thing?

Ms. KUHL. Well, it would be a very long process creating that body of law. The social security system, I think, is a good example of that. Issues of law, sometimes closely coupled with issues of fact, are being continuously litigated in that system and there are almost an infinite variety of questions that can arise. It takes many years to litigate even one issue of law on which there is a conflict in the circuits to a resolution because you will go through the district court process to the court of appeals maybe a couple of years later until a conflicting position results in another circuit. And the Supreme Court simply is not constituted to be able to take a sufficient number of cases every year to resolve these conflicts. Therefore, it is a very long and tortured process of creating that body of law even though it might exist theoretically.

It is my understanding that the VA has had good success in developing uniformity in its own body of law, uniformly applicable within the administrative system presently.

Mr. HILLIS. One final question. It's been indicated that about 74 percent of the cases considered by the Board of Veterans' Appeals are denied and that would mean about 26 percent are allowed. If these figures are anywhere near accurate, how do you view them? Are they comparable to court decisions of aggrieved persons in, say, social security cases?

Ms. KUHL. I really do not have a good basis on which to judge in comparison to social security cases. I would be glad to check with the Social Security Administration and see what percentage of their cases are ultimately denied when looking at the process as a whole.

Mr. HILLIS. It might be helpful information for the record if you could do that.

Ms. KUHL. We will try to get that information and submit it to the committee.[1]

Mr. MONTGOMERY. Don Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I appreciate the testimony of Ms. Kuhl. You testified that there is no proof that this legislation is needed and that most claimants are taken care of. What about the others? Don't you think that the others deserve some consideration, especially when we see that in social security—where there is judicial review—in 25 percent, or something like that, of the cases that go to judicial review, the court finds that the agency, the bureaucracy, was wrong or denied the appropriate remedy?

Ms. KUHL. There's not a guarantee of justice, that is, of the right result in each individual case in the judicial system either. I am certain that in the administrative system one could point to a mistake that has been made. It is no less true in the judicial system. Mankind is not perfect; judges are not necessarily more perfect than administrators in a good system.

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[1] See p. 146.

In the social security system the high reversal rate exists at every stage of the process. The administrative law judges reverse 60 percent of the determinations initially made and that high reversal rate continues. Half of the cases that reach the district court are reversed and remanded to the Social Security Administration in that system. In our view, that is a product of a system in which there is not a consistent body of law being adequately developed. Because of the distribution of the developing legal issues across the country in the many circuits, there is inconsistency and uncertainty in that system.

Mr. EDWARDS. Well, I don't really think that you answered the question as to what we are going to do with the people who are denied a further remedy in the system that we have now. If it's 25 percent in the civil service appeals where there is a reversal, why wouldn't it be about the same percentage in the VA system? As I said, don't those people count?

Ms. KUHL. Well, I am not certain that you can draw the inference that there would be the same reversal rate in the veterans' benefits area, and, as I say, the courts make mistakes as well. Sometimes there is an opportunity for Congress to enact a private relief bill. Obviously, that's very rare, but as for those persons who are in one's view unjustly treated, it is the same remedy that a person unjustly treated in the court system is left to.

Mr. EDWARDS. You also gave as a reason for being in opposition to this bill that the courts are overburdened now and would be further overburdened. Is that really a satisfactory basis for denying a remedy? Wouldn't a better remedy be to require the courts to shape up?

Ms. KUHL. Well, there has been an increase in the caseload which has continously outstripped the ability to supply judges to that system. We don't really know what the causes are in the increase in litigiousness in our society. Perhaps if we knew more we could do something about that.

I have not suggested that the caseload alone is an adequate, independent basis for denying judicial review if there were, first of all, a provable problem in the existing system and, second, if we could be certain that we were going to make things better. And that, I think, is the real heart of our view, the Department of Justice's view of this matter, that we may in fact make things worse, not better.

Mr. EDWARDS. My last quick question, Mr. Chairman. We have a precedent here with the Board of Correction of Military Records, used mostly by officers I believe. There is judicial review for BCMR decisions yet. For decisions under the Board of Correction of Military Records, there are less than 100 cases that end up in the courts per year. Isn't this an indication that judicial review for veterans is not going to overburden the courts?

Ms. KUHL. Well, Mr. Congressman, I am not exactly certain what the legal issues are in that particular area. I think that frankly within the veterans' benefits area the more proper analogy would be to the social security system where there are medical issues and that type of thing, and I think that analogy would probably be a better one.

Mr. **Edwards**. Thank you, Mr. Chairman.

Mr. **Montgomery**. Thank you, Don. Do any other members have any questions they would like to ask this witness?

Dr. Rowland.

Dr. **Rowland**. Thank you, Mr. Chairman. While it may seem that denial of this right does deny a basic constitutional right, I also question the validity of the overloading of the courts as being a reason for not doing it.

But I want to ask a question for information. In the active military now, is there a right of appeal outside of the military judicial system? I know there is a difference of being charged with a crime and looking for some benefit here, but is there any allowance for people in the military on active duty to appeal outside of the system?

Ms. **Kuhl**. I am not certain of the answer to the question and I would want to be specific, I think, with regard to exactly the conditions under which review is allowed, if it is allowed. So, with your permission, I would like to submit that answer for the record.[1]

Dr. **Rowland**. I would like to know about that, Mr. Chairman, because if we do allow review outside of the system so far as veterans are concerned, it would just open the door for a possible appeal for people in active military service—are they being denied a constitutional right by not being allowed to appeal outside of the system? I would like to learn about that.

Mr. **Sutton**. Mr. Chairman, I've got some things to say about that.

Ms. **Kuhl**. Mr. Chairman, if I could make one additional comment, if that would be appropriate.

Mr. **Montgomery**. Jim—excuse me just a second. We are very glad to have our friend here, the Vietnam veteran, but he is not a witness this morning. We would be glad to have members talk to him at a later date. We are glad to have you here, but we will have to proceed in an orderly manner, which you understand.

Thank you.

Ms. **Kuhl**. I just wanted to make one comment on the issue whether there is a due process right to review here. The courts have held that there is no constitutional right of judicial review of an administrative order. The Supreme Court has held that under the statute involved here, there is review available when the constitutionality of a statutory provision in this area is questioned, but the courts have held there is no other due process right to judicial review.

Mr. **Montgomery**. The Chair recognizes Lane Evans, then Mr. Penny, and then Mr. Don Edwards, the way you came in.

Mr. **Evans**. I want to get something straight. Did you say that about half of the social security cases appealed to district courts are reversed?

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[1] See p. 146.

Ms. KUHL. That is correct. Half are reversed or remanded. But that is characteristic of a reversal rate that exists throughout the social security process at every layer of review.

Mr. EVANS. Well, expecting nearly 25,000 cases, as I understand, if there was a judicial review bill appealing to veterans with the same reversal rate, you could possibly have 12,500 veterans with a reversed decision. In other words, a veteran appealing to district court and having his case reversed would be happier than having to deal with the Board of Veterans' Appeals in the VA.

Isn't that a pretty significant number of people per year that presently don't have that kind of remedy. And isn't this evidence that there is widespread injustice without judicial review?

Ms. KUHL. No, there certainly can be no correlation drawn between what the reversal rate is in the social security area and what it would be likely to be in the Veterans' Administration area——

Mr. EVANS. Well, why do you use the social security system as an example of what would happen with judicial review?

Ms. KUHL. I am using that as an example because we know from that system that there are inconsistencies in the law among the various circuits, among the various district courts. It is an inevitable result of the process of appealing in the article III system that we now have. I am using the social security system as an example of that.

There is no way of know whether the decisionmaking administrative process in the social security area is better or worse than the administrative decisionmaking process in the VA, although, again, we have not heard accusations of widespread unfairnesses in the VA system and, indeed, there seems to be a fair degree of satisfaction with the general outcome in this area.

Mr. EVANS. Well, I just have a comment then, Mr. Chairman. We hear constantly on this committee from the VA and from this administration that they cannot afford agent orange compensation, that they cannot afford post-traumatic disorder treatment centers, that they cannot now afford judicial review, that the courts would be overburdened, that there would be a backlog of cases. I wonder when veterans are going to have some priority in this country? This just seems another attempt, in my opinion, to say, "When it comes to veterans, we can't afford it. We can afford it for social security, we can afford it for all kinds of other administrative agencies, but not for the veterans of our country."

Ms. KUHL. I would just say in response to that, if I may, Mr. Chairman, that the administration has proposed that the caseload has far outstripped the ability of the existing Federal judiciary to deal with it and we have, therefore, asked the Congress for additional slots for the district court judges and court of appeals judges necessary to deal with even the existing caseload.

Mr. MONTGOMERY. Thank you, Ms. Kuhl. Thank you, Mr. Evans. The Chair will recognize Mr. Edgar and then Mrs. Johnson of Connecticut.

Mr. EDGAR. Thank you, Mr. Chairman.

I am having a little problem in understanding how you and the Justice Department know what the caseload would be of veterans' appeals. Can you give us some data as to how would you would know what the impact would be on the courts?

Ms. KUHL. Well, we do know that there are approximately 34,000 cases decided per year by the Board of Veterans' Appeals. Of those the denials would be approximately 25 percent and some percentage would be appealed of those 25 percent. So you have a total universe, if every case were appealed of what could be 10 percent of the existing Federal caseload.

Mr. EDGAR. Don't you believe that that caseload would begin to taper off over time as the courts would handle those cases and people would see that it is not as easy as they might have anticipated, and that only those more serious cases would, in fact, go to judicial review?

Ms. KUHL. Well, indeed, it may increase over time because, again, I come back to this inconsistency among the circuits that can be expected. Those inconsistencies are the stuff that lawyers look for when they are trying to find a way of succeeding in a reversal. The more the law is in a state of flux, the more fertile the field for the legal profession and indeed it may increase over time.

Mr. EDGAR. Let me ask you two specific questions: Do you know anything about agent orange?

Ms. KUHL. I am not aware of the medical or chemical aspects.

Mr. EDGAR. Let me ask you a second question. Do you know anything about atomic veterans and their needs?

Ms. KUHL. Again, that is something that is in litigation in the Justice Department.

Mr. EDGAR. I don't anticipate that you would know anything about that and the VA has a stated policy while they are attempting to try to help in the agent orange area and in the atomic veterans area, if persons go through the Board of Appeals because there is no compensation as a war-related injury for either exposure to toxic chemicals or exposure to radiation or, in very rare cases given any clear analysis, don't you think that it would be realistic and responsible to adjudicate in the courts as opposed to an agency having the final say in terms of the appeal process who, clearly—while it's not up to you to know anything about those subjects who have taken pretty much a stated policy that they, on an overall basis, don't want to give compensation, don't want to see it as a war-related, service-connected injury, don't you think that is really a legitimate role of the courts to decide whether or not there was causality?

Ms. KUHL. Well, I certainly don't want to make any representations or accept any characterizations of what the VA has done in this area or what stances they have taken either as a policy matter or as an individual matter——

Mr. EDGAR. May I interrupt you there?

Ms. KUHL. Yes, you may.

Mr. EDGAR. In your statement though you come representing the Justice Department making a statement about whether or not the VA's appeal process at present is adequate to protect the rights of people, so I have difficulty with your prefaced remarks just then because if you can't make the statement about what the VA does, then how can you as the Justice Department, make a statement as to whether or not they are accurate?

Ms. KUHL. Our suggestion in our statement that we are not aware of allegations of widespread unfairness in the system—and I also suggested in my summary statement that if there are specific areas of problems those can be dealt with through the legislative process as well. To give it to the court system is to require perhaps years, perhaps even decades for those problems to be worked out.

Mr. EDGAR. Let me ask you this question. If you, as a Justice Department employee, were discriminated against on the basis of sex and you went through the appeal process and your superiors and those in the appeal process simply denied any allegations and yet you had factual evidence to demonstrate you had been prejudiced against, wouldn't you want the right of a judicial opinion as to whether or not that was discrimination against you?

Ms. KUHL. If I were able to go to an independent board such as the Board of Veterans' Appeals I would feel satisfied.

Mr. EDGAR. Thank you, Mr. Chairman.

Mr. MONTGOMERY. Thank you, Mr. Edgar. The Chair got the order a little fouled up. The Chair recognizes Mrs. Johnson and then Mr. Penny. I am sure Mr. Penny will understand. Nancy Johnson of Connecticut.

Mrs. JOHNSON. Thank you very much.

I see this matter a little differently than my colleagues, I gather. I have been involved in many cases of both sex discrimination and other kinds of benefit denials that have been in the courts, and denial of timely justice is indeed denial of justice. I think that the matter of overcrowding is a very serious matter and does have an impact on whether justice is even available. The States throughout the Nation are taking more and more cases out of the court and handing them to administrative judges and, while in those instances there are opportunities for appeal, nonetheless, there is a whole body of actions that indicates that to delay that justice is indeed to prevent justice.

So while I appreciate the intent of this legislation, I think we have to very carefully consider both the impact on uniformity and on access to justice and I would like to know whether your Department has done any evaluation or whether there is any research available on the appeals rate in administrative courts at the State level, assuming that the Federal judiciary doesn't have that kind of process, but I don't know that. Does the Federal judiciary have that kind of process in other areas where there is the right of appeal from which you could gather some information about appeal rates in the those settings?

Ms. KUHL. You are talking about something like a State administrative process where there wouldn't be a final appeal to the courts and the timing of that vis-a-vis an analogous process with appeal to the courts.

Mrs. JOHNSON. Yes.

Ms. KUHL. I do not have that information at hand, but we would be glad to do a search and perhaps the Administrative Conference would have something available with regard to those timing considerations.

Mrs. JOHNSON. I don't think that that information is available for the Federal system, but I think it must be available for the State systems. I think in the last 3 or 4 years there has been a movement in that area, so for us to be able to take a look at what has been the experience of the administrative courts in appeal procedures and review demand would be helpful. If you could get us any information along that line, I think it would be appreciated.

Ms. Kuhl. We would be happy to see what is available on that subject.[1]

Mrs. Johnson. I think also if you could give us some more detailed information about the experience of social security appeals—how many are remanded, what are their categories of reasons. If we could get a better understanding, we can, I think, look more realistically at the problems here and I think, from our part, I would like to have a better understanding of whether the energy for this bill comes from primarily the concern with agent orange and atomic exposure or whether it is more broad spread. I think that information also ought to play into our evaluation of making as broad a change as this would affect.[2]

Thank you.

Mr. Montgomery. Thank you, Mrs. Johnson.

Mr. Penny.

Mr. Penny. A lot of the discussion has centered around the increased workload for the court system. Would the establishment of a special appeals court for these veterans' cases satisfy some of your concerns or the concerns of the Department of Justice?

Ms. Kuhl. It would help in the area of the inconsistencies that I have referred to. If you did have a court, say, an article I court, to which all of these cases would be appealed and then, say, a further appeal to an appellate court such as the court of appeals for the Federal circuit, which would also be a single court for the entire country, you would eliminate some of the inconsistencies I have talked about.

Problems remain, of course, because it still introduces an adversary aspect into the system and probably that will create problems in the administrative area as well. Your suggestion does, however, help some of the problems I have been discussing.

Mr. Penny. I would also like to find out your opinion regarding appeals based on appeals from veterans who are filing for compensation because of agent orange exposure or exposure to atomic radiation. Is it your opinion that appeal on the basis of denial of procedural due process is available to victims of agent orange or atomic radiation exposure based on their demonstration of evidence that the VA has a policy against granting too many of those cases. It does seem to many of us to be a policy decision to limit the expansion of compensation in this area. So few veterans are receiving compensation in these cases. Would you view that as a procedural decision?

Ms. Kuhl. Well, we certainly look at all of these cases individually in considering the defenses that we raise. However, to the extent that you are talking about a challenge of individual adjudications in the agent orange area, 211(a) would seem to preclude judicial review.

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[1] See p. 148.

[2] See p. 148.

Mr. PENNY. My concern here is that there seems to be a policy in place that brings into question whether the VA is really bringing in a case-by-case determination here or whether there is a general prejudice against granting compensation in those areas. I was trying to get a handle on whether an appeal based on due process would be possible in those cases. I understand your answer to be "no," that that probably isn't the case, and that the view is that these are being handled on a case-by-case basis and there is no procedural prejudice against veterans filing claims based on exposure to radiation or to agent orange. Is that correct?

Ms. KUHL. Well, I don't think I can really improve on my earlier answer that to the extent you are talking about a challenge to individual adjudications, 211(a) certainly would seem to preclude review.

Mr. PENNY. I have no further questions.

Mr. MONTGOMERY. Thank you, Mr. Penny. We'll have a vote in a minute. I'll just see if anybody else has any other questions.

We thank you for being here this morning. We have a very fine attendance of the subcommittee. Marcy Kaptur, do you have any questions?

Ms. KAPTUR. No questions, Mr. Chairman.

Mr. MONTGOMERY. Well, if there are no questions, Ms. Kuhl, you have handled yourself very well here this morning. We would hope you would stay around to hear the next panel, which will be mainly made up of veterans organizations and this will be our last panel this morning.

The committee will recess, but we would like to ask the members of the subcommittee, if you can, to come back and hear this last panel.

Mrs. JOHNSON. What time will we reconvene, Mr. Chairman?

Mr. MONTGOMERY. We will reconvene in 15 minutes. It is a vote on the Journal so the committee is now in recess.

If the different veterans organizations would come up to the witness table, we will be ready to go when we come back.

[Brief recess.]

Mr. EDWARDS. The subcommittee will come to order again. We are pleased now to have testimony from a very distinguished panel: Lt. Col. David J. Passamaneck, who is the national legislative director of AMVETS; John F. Heilman, national legislative director, Disabled American Veterans; Paul S. Egan, deputy director of the National Legislative Commission and Robert E. Lyngh, director of the National Veterans Affairs and Rehabilitation Commission of the American Legion; and Mr. Phil R. Mayo, special assistant, National Legislative Service, Veterans of Foreign Wars. Is Mr. Clark with you also?

Mr. MAYO. Yes, sir.

Mr. EDWARDS. Well, we are pleased to have Mr. Clark also. This certainly is an impressive group of witnesses.

Without objection, all of the statements will be made a part of the record. Who wants to be first?

Colonel PASSAMANECK. I will go first as long as my name is first.

STATEMENT OF A PANEL OF WITNESSES CONSISTING OF LT. COL. DAVID J. PASSAMANECK, NATIONAL LEGISLATIVE DIRECTOR, AMVETS; JOHN F. HEILMAN, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS; PAUL S. EGAN, DEPUTY DIRECTOR, NATIONAL LEGISLATIVE COMMISSION AND ROBERT E. LYNGH, DIRECTOR, NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION; AND PHILIP R. MAYO, SPECIAL ASSISTANT, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS, ACCOMPANIED BY MR. CLARK

STATEMENT OF COLONEL PASSAMANECK

Colonel **Passamaneck**. AMVETS is pleased to present its views on the issue of judicial review of veterans' claims. Because the invitation does not specify any particular proposed legislation, we will dwell on the concept of judicial review and only touch on some of the ancillary issues such as procedure, rules of evidence, and attorney's fees, which are raised by pending legislation such as S. 636.

AMVETS is fully appreciative of the deserved description of VA adjudicated proceedings as "nonadversary." We believe that in most cases the system is administered with skill, compassion, and objectivity by VA officials and that the legitimate interests of the claimants are given the respect to which they are entitled.

We are most favorably impressed with the relative low cost and efficiency of the VA adjudicative system, employing as it does the services of trained specialist representatives of the service organizations who assist claimants at no cost to them.

When we contemplate the insurmountable costs associated with litigation in the Federal courts, the VA system looks very good in comparison.

The underlying issue with which we are concerned, however, when we consider providing access to the courts for the veteran claimant is the question of whether that claimant should have the option of judicial review of his or her claim in accordance with the claimant's own judgment of the merits of the claim and the risks and costs involved.

AMVETS believes that claimants for noncontractual VA benefits and entitlements should have the same right of recourse through the court system as claimants for other governmental entitlements after exhaustion of administrative remedies.

We believe that the right to take the risk of litigation belongs to the claimant and should not be precluded by the good offices of VA adjudicators or service organizations, however benevolent their motives. Veterans are full-fledged citizens and are entitled to the same rights and privileges as other citizens. The idea that they must be protected from the harsh realities of the real world by an insulative adjudicative system is an insult, not only to their intelligence but to the sacrifices they have made to preserve the very system of justice from which they are excluded.

As to the scope of review, the courts in *Johnson* v. *Robison, Plato* v. *Roudebush, Wayne State University* v. *Cleland* and other cases in recent years have made it clear that judicial review does, in fact, prevail where the issues pertain to the basic fairness of VA regulatory or adjudicative procedures. The cases, however, have not all been consistent throughout the circuits and legislation to clearly define the scope of permissible review is badly needed.

The review of VA determination should be restricted to the evidence of record, the constitutionality, statutory authority of the agency's actions, and regulations, and whether or not the burdens of proof and benefit of doubt have been properly adhered to. No one is seriously suggesting that the courts substitute for the professional factfinding machinery of the VA adjudicative system. The claimant is, however, entitled to an evaluation of the significance and weight of the evidence by an impartial tribunal completely independent of the VA after exhaustion of administrative remedies.

Despite the conceded benevolence of the VA under the current system, the fact remains that in determining the outcome of claims, the VA serves as judge, jury, and executioner in a closed, potentially self-serving system. In discussion on the issue of judicial review thus far many of the supporters of review have specified that such reviews should be limited to questions of law and regulation. AMVETS adheres to this concept as long as it is clearly understood that it specifically includes a reevaluation of evidence of record to determine whether burdens of proof have been sustained and benefit of doubt has been afforded.

Review which would be restricted to the constitutionality and statutory authority of regulatory and administrative actions of the VA is what we already have as a result of the cases which we cited earlier. We thus favor a somewhat broader scope of review than that apparently provided in S. 636, a view more consistent with Senator Cranston's.

With the current fee restrictions, even if judicial review were permitted, the veteran would be precluded from employing competent legal counsel in his cause. If those restrictions were to persist, the service organizations and legal aid agencies would be obligated to assume most of the costs of judicial review of VA determinations, an obligation which would be beyond the capacity of most service organizations.

AMVETS therefore supports the proposed modifications of the fee restrictions set forth in S. 636, 98th Congress. By the same measure of fairness, we believe that the other provisions of S. 636 relating to standardizing of administrative procedures and judicial review should be enacted, subject to the views which I have expressed on the scope of factual review.

Since 1979, Mr. Chairman, legislation substantially identical to S. 636 has been enacted by the Senate with no corresponding action in the House. All of the major veterans organizations except one have consistently supported judicial review in some form.

From 1977 through 1979, the VA not only supported judicial review but the General Counsel's office pioneered in the expostulation of its merits. With the change in administrations the VA switched sides on July 15, 1981, and opposed review, because, as they explained, they came to realize that it would cost too much.

In other words, we should be unwilling to spend the necessary funds to secure for the veteran the same procedural fairness which every other citizen has relating to all other Federal agencies.

The overwhelming majority of the veterans in this country want judicial review, as evidenced by the decisive action of the Senate in

1979 and 1982. The opposition of the minority should not be permitted to continue to block this necessary enfranchisement of our Nation's veterans.

Thank you.

[The prepared statement of Colonel Passamaneck appears on p. 149.]

Mr. **Edwards**. Thank you, Colonel Passamaneck. I believe Mr. Heilman is next, is that correct?

Mr. Heilman is national legislative director of the Disabled American Veterans.

STATEMENT OF JOHN HEILMAN

Mr. **Heilman**. Yes, sir. Thank you, Mr. Chairman. I will summarize my prepared statement. Let me start off by saying that the DAV believes that when you look at the adjudication process of the VA, most likely, an objective analysis would indicate that claims decisions are being performed by a competent, dedicated VA personnel and that these decisions are fairly equitable; they are not capricious or arbitrary.

Never the less, the VA is unique among all Federal departments and agencies in terms of the isolation of its decisionmaking process not being subject to any form of judicial review. It has been noted that the VA passes judgment on claims that are made against its agency and, in some cases, it offers representation to the veteran who is filing a claim. It is judge and jury and, as I indicated in my statement, commonsense says that if you are going to sue the railroad you don't hire a railroad attorney.

In accordance with our convention mandate, therefore, the DAV does support the basic concept of judicial review. We do believe that a VA claimant that has received an adverse benefit determination and who has appealed such a determination all the way through the process up to and including action by the Board of Veterans' Appeals should have access to some form of judicial review.

Having said that, I must note, again in accordance with the convention mandate, we do not favor placing judicial review in the Federal district court system, as is proposed by the Senate-passed bill and other bills pending in this committee. We favor the creation of an independent court of veterans' appeals. It would consist of judges appointed from civil life by the President, subject to Senate confirmation. Legislation to that effect has been introduced and is pending in this committee.

I would also point out that we do not favor one other title in S. 636 and that is changing the present attorney fee limitations that apply to private attorney representation in VA proceedings. We do not believe that this should be modified. I will point out that we would have no objection to the payment of reasonable legal fees in any judicial review process that the Congress might enact, but we do not believe the fee limitations should be removed for VA representation.

I will conclude now, Mr. Chairman, and, of course, be willing to answer any questions you have later.

[The prepared statement of Mr. Heilman appears on p. 154.]

Mr. **Edwards**. Thank you, Mr. Heilman. Mr. Paul S. Egan is deputy director of the national legislative commission of the American Legion. We welcome you.

STATEMENT OF PAUL S. EGAN, DEPUTY DIRECTOR, NATIONAL LEGISLATIVE COMMISSION; AND ROBERT E. LYNGH, DIRECTOR, NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION

Mr. **Egan**. Thank you, Mr. Chairman. Bob Lyngh here, to my right, is going to summarize our remarks. I think a couple of prefatory remarks are in order, however, as we have been identified as apparently the only other organization that has opposed judicial review in the past. I think it's fair to say that we recognize the substance and merits of the arguments on the opposite side of the issue from us, but we respectfully submit that the majority of delegates at our national convention have consistently come down in favor of the position that we espouse today. I would add that until that changes we will continue to uphold that position, and certainly we would ask that our position be recognized equally to that on the other side of the issue.

Mr. **Edward**. Thank you, Mr. Egan.

Mr. Lyngh.

Mr. **Lyngh**. Thank you, Mr. Chairman. On behalf of the 2½ million members of the American Legion we are pleased to have this opportunity to present to the subcommittee our views on judicial review.

The present position of the Legion on judicial review is set forth in resolution No. 141 emanating from the American Legion, State of Ohio organization, adopted by the 1982 National Convention. A copy of the resolution is attached to the statement and is commended to the subcommittee's attention.[1]

In discussing the present position of the Legion, it is appropriate to state to the subcommittee that judicial review continues to be a matter of active consideration by this organization. It is expected it will again be considered at our National Convention which will take place next month. If the delegates to the convention effect a change in position, the subcommittee will be so notified.

At the moment, however, we must place before the subcommittee the reasons that have guided the Legion to its present position and have caused it to look unfavorably on the concept of judicial review since 1959. We take note of the fact that current bills pending in Congress and providing for judicial review of veterans' claims have been modified in some measure from bills presented in earlier Congresses. There seems to be an effort here to address some of the concerns the Legion has heretofore expressed.

Whether the modifications would, in fact, achieve the desired result in actual practice would remain to be seen. However, it must be said that modifications included in currently pending legislation do not completely allay the concerns the Legion has as to the fundamental effects of the imposition of judicial review on the present system of adjudicating veterans' claims.

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[1] See p. 171.

The conclusion we draw is that veterans under the present system of claims adjudication within the agency of the Veterans' Administration receive more consideration and have a better chance to develop their claims successfully than they would if the possibility of litigation in the Federal court loomed over each case while it was in the process of development and presentation before local rating boards and the Board of Veterans' Appeals.

Part of the problem lies in the fact that the average person, including attorneys, do not understand how this could be so because they are not experienced in claims development and presentation. It is necessary to engage in this work, as American Legion service officers do on a daily basis, and to know how the VA adjudication system works in order to take advantage of the various avenues that can be used to promote successful consideration of claims.

It is our considered judgment, based on our long experience at helping veterans get benefits from the Government that, given the judicial review of veterans' claims, we will end up losing more cases than we will win, speaking of that category of cases that is most controversial, marginal and thus, the most difficult to argue.

The American Legion's historical record in winning difficult cases is a good one. We are as expert in the business of veterans' advocacy as is any other person or group that deals in veterans' affairs and all we can offer is our best judgment, which is what we are doing at this time.

This leads us to two final points. First, the American Legion's position is not set in concrete in the matter of the current limit of $10 as an attorney's fee for services rendered in the pursuit of justly entitled benefits. The attorney is fairly entitled to recover the cost of providing service, where such services are desired. The American Legion has no objection to an adjustment of the attorney fee now provided by law with the obvious provisal that the adjusted amount should not be so high as to be lucrative to the provider.

Second, the American Legion wishes the record to show that it has no essential objection to the establishment of an independent court of veterans' appeals, whether to sit in Washington or to have traveling panels. Should Congress decide the establishment of such an independent court would enhance the veterans' effort to obtain benefits to which entitled, the Legion would view such an initiative from a positive perspective.

Thank you, Mr. Chairman.

[The prepared statement of the American Legion appears on p. 161.]

Mr. Edwards. Thank you, Mr. Lyngh.

Our last member of the panel to testify represents the Veterans of Foreign Wars, Mr. Phil R. Mayo, accompanied by Mr. Clark.

STATEMENT OF PHILIP R. MAYO, SPECIAL ASSISTANT, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. Mayo. Thank you, Mr. Chairman. The subject of judicial review of Veterans' Administration benefit determinations has been before the Congress for many years. Since the 94th Congress proposals have been introduced to afford veterans their day in court. In supporting judicial review, however, the VFW is not being critical of the VA's claim processing apparatus, including the Board of Veterans' Appeals.

Mr. Chairman, our resolution supports legislation which would provide judicial review of Veterans' Administration benefit determinations concerning questions of law and regulation. We believe that this concept would adequately permit dissatisfied claimants to seek relief in the appropriate court upon exhaustion of their administrative appeals, meaning no lawsuit could be initiated until after a final decision had been rendered by the Administration.

By limiting judicial review to questions of law and regulation we believe a flooding of cases to the Federal courts is avoided and, at the same time, the informal, flexible review procedure currently in place within the VA is preserved.

We do not believe the interpretation of facts by the Administration has been the major impetus behind the aspiration for judicial review nor do we contemplate such a judicial review since such would lead to de novo review of claims.

Rather, the interpretation of law and regulation, in our opinion, is most in question. We submit, Mr. Chairman, that for many veterans claims proceedings before the Administration are the most important event in their lives, that many believe they are involved in a legal proceeding the importance of which causes them to question our professional staff as to the availability to them of higher relief in the courts.

Although our resolution does not address the issue of attorney's fees we are of the opinion the current $10 limitation on such fees, payable to attorneys representing veterans before the VA is unrealistic. The limitation on attorney's fees dates back to the post-Civil War period with the present $10 level being established in 1924. The intent of this limitation was to protect veterans from those who would resort to unscrupulous means in order to generate clients. It does not appear that there was consideration given at the time of imposing this limitation to the fact that court review would be a possibility or to the sometimes very complex nature of today's cases.

This limitation also effectively denies the VA beneficiary the freedom and right of choice of representation in pursuing a claim with the VA.

This concludes our oral statement.

[The prepared statement of Mr. Mayo appears on p. 173.]

Mr. Edwards. Thank you, Mr. Mayo, and that concludes the testimony by the four major veterans organizations in the United States. It appears that three out of four are in favor of judicial review and the fourth, the great American Legion, is sort of in opposition, but wavering and perhaps might change its mind at the next convention. I believe that was what your testimony was, Mr. Lyngh.

Mr. Lyngh. Yes.

Mr. Edwards. The gentleman from Illinois, Mr. Evans.

Mr. Evans. Thank you, Mr. Chairman.

I would just like to address a few questions to the American Legion representatives. You state that entry of veterans' claims into the Federal judiciary system would immediately place the veteran in an adversarial relationship with the United States in seeking approval of claims. But, don't your service officers often advocate in an adversarial manner in regards to claims they are presenting in the administrative process? Isn't the involvement of the Legion service officers quite often adversarial in nature?

We often talk about an adversarial role, and I know from my own experience with Legion service officers that they often try to arbitrate and come up with compromises. But when hard-pressed they also push for their veteran claimant, and that is as much an adversarial kind of relationship in certain instances as a lawyer representing a claimant in court.

Mr. LYNGH. Well, Mr. Congressman, there is an essential, but nevertheless, definite difference. The fact of the matter is that the judicial system of the United States is an adversary one, which means that, per se, when a person enters the judicial system on any kind of case he is in an adversarial relationship to the other side of whatever motion or action he files in the Federal court.

The relationship of the Veterans' Adminstration is basically a cooperative one. The object of the agency is to provide the veteran all of the benefits to which he is entitled. Naturally, the American Legion when it appears as representative of the veteran appears in an advocacy role and our object is to make sure that all of the evidence that tends in the direction of a favorable disposition of the claim is presented to the Veterans' Administration. It is not, essentially, however, an adversarial relationship as you find in the Federal judiciary. That's the difference.

Mr. EVANS. You also state that part of the problem lies in the fact that the average person, including attorneys, would not understand how this could be because they are not experienced in claims development presentation. I give your service officers, again, more credit than anybody in knowing how to present the evidence, present a claim. But attorneys who are not often involved in the actual administrative process in the Social Security Administration often take a case after it's gone through the administrative process of appeal in the Federal court. I wouldn't think that I know social security law any better than some of the paralegals that work in it today, but I have to say that we won cases and we were able to present those cases effectively and, particularly, I think we were more effective in some ways than the paralegals in arguing law and regulations.

If you have had the experience of people who don't normally work with social security but can argue those regulations and laws, can't you see that the same situation might apply to the veterans process?

Mr. LYNGH. Mr. Congressman, I wouldn't agree they were in a better position, I would say this: We believe that our service officers know more about the development and presentation of claims than anyone else in the country today. At the same time, if the lawyer takes the veteran's money, we assume that he is going to prepare his case and present it effectively. We certainly would not imply otherwise. We have to assume that he would do that.

Mr. EVANS. I guess I am trying to point out that this is not going to be a de novo of hearing at the judicial review hearing. It is going to be based on the application of law and regulation for the particular case. Through my own experience with lawyers, I believe they can argue law better than most people that are not trained in argument. Maybe that's a reflection on lawyers that they are overargumentative, but I do think that lawyers are particularly equipped to handle the kinds of issues that would be involved in judicial review cases. I think service officers, although they know their regulations and can argue the law, more or less present the case factually. We are not trying to change that. Under the bill, we are not going to allow any kind of de novo consideration of facts. That's why I think lawyers do have a particular position in arguing the law and facts, as the VFW has pointed out.

Mr. LYNCH. Well, I would ask you to keep in mind, Mr. Congressman, that the overwhelming majority of cases that are in dispute in the Veterans' Administration involve the evaluation of evidence.

Mr. EVANS. All right. Thank you.

Mr. EDWARDS. The gentleman from West Virginia, Mr. Staggers.

Mr. STAGGERS. Thank you, Mr. Chairman.

Mr. Heilman, you mentioned about the court of veterans appeals idea. Could you elaborate a little bit on that and tell me how that would be different from the present system?

Mr. HEILMAN. Yes, sir. First of all, perhaps I should just briefly say why we don't believe claims should go in the Federal district court system. One major factor is decision uniformity. That's a problem right now in the VA system. Across the country the various regional offices will sometimes pass judgments on cases that are identical or very similar in quite a dissimilar fashion. Decision uniformity is a goal that's recognized by all in the veterans community as one that should be achieved, and the VA itself, of course, is attempting to achieve that.

We have 97 Federal district courts in the system. I think we would find a great disparity in the types of decisions being rendered across the country and that certainly is undesirable. The dockets are crowded now and if we are talking about the 4,000 or 5,000 cases per year, that is a sizable load to put into the system.

The appellate period would be lengthy for veterans claimants; it would be costly for veteran claimants if they were in the Federal district court system.

I also want to point out that the bills that advocate putting it there would, in fact, deny a veteran the right to continue, if he chose to do so, the service organization representation that he had up through the VA process. Most national service officers from the various organizations are not attorneys, they could not go into the Federal district court system to continue their representation. Should the claimant desire that, he would have to employ an attorney. And if we are concerned about representation and if we are concerned about the fact that attorneys should be allowed into the game or allowed to represent veterans in a judicial review proceedings, we should also be concerned that the veterans would not be allowed to continue their service organization representation that they now have.

We favor the creation of a single court of veterans' appeals whose sole responsibility would be to handle such adverse decisions that have been denied by BVA. Decision uniformity would not be a problem and we would probably find in a very short time that you would have uniform decisions being handed down by such a court.

The length of time in terms of cost and the length of the appeal would be much shorter by virtue of a court of veterans' appeals and commissioners, as opposed to the Federal district court system.

Under our proposal veterans could have both private attorneys being compensated reasonably for representation or, under our bill, the court would allow the representation of the veterans organizations. So, basically, that's the reason behind our position.

Mr. **Staggers**. So you do see a difference between the system as it exists now and your idea? I assume what you are talking about is something similar to a bankruptcy judge maybe, something specific that they deal with that would be removed from the present system.

Mr. **Heilman**. Yes, sir.

Mr. **Staggers**. I don't direct this to anyone specific—whoever wants to answer it—anyone who does favor the judicial review, at what level of the Federal court system should the process of judicial review begin? Is there any feeling?

Mr. **Mayo**. You mean at which court it would enter initially after—maybe I didn't understand the question.

Mr. **Staggers**. The same as any other.

Mr. **Mayo**. I don't know that we would have any specific court in mind as to which level it should enter. Our resolution doesn't address that. Between our last two conventions we had a panel that went very deeply into this issue and I don't know that that was a matter that was resolved, as to where it would actually enter the court system.

Colonel **Passamaneck**. If I may address that question, sir, if we are going to get into the Federal court system, other than a special separate veterans' court, we would definitely favor going in at the district court level for the simple reason that we, as I tried to make clear, in my statement, we want a factual review. By that, we don't mean de novo; we mean that we take the record and we look at it and we see whether or not we agree with the determination of the factfinder as to whether or not the veteran has a service-connected disability or whatever. We feel that that is an essential part of the process, just as Senator Cranston pointed out in his testimony, and that can only be done at the district court level. The court of appeals, circuit courts, and so forth, can never—or are not supposed to anyway—they probably do it under some other description—but they are not supposed to make findings of fact or pass judgment on findings of fact, as to whether a burden of proof has been sustained and so forth. Therefore, we specifically would want to enter into the system at the district court level.

Mr. **Staggers**. Mr. Chairman, I have another question, but I know we have another member. If I could be recognized once again, I would appreciate it.

Mr. **Edwards**. Yes, we will come back to you.

The gentlewoman from Connecticut, Mrs. Johnson.

Mrs. **Johnson**. Thank you very much.

I would like to just follow up for a moment on Mr. Staggers' line of questioning, which I think was very helpful. Colonel, you want specifically to be able to enter at the district court level, because you feel that the district court is the only level at which the findings of facts can be reviewed, is that correct?

Colonel PASSAMANECK. Yes, that's correct; yes, ma'am.

Mrs. JOHNSON. Then if you entered at the district court level would you not then be granting several more layers of appeal—and not being a lawyer I don't know exactly how many, but you would certainly be able to appeal then right to the district and Federal court level and all the way up to—what is it—three or four levels of appeal from there?

Colonel PASSAMANECK. Well, to answer your question, ma'am, the choice is between getting into the system at the court of appeals level and then having the option to go to the Supreme Court, if you are lucky enough, that is, or getting in at the district court level which is one more, that's all. It's a question of three levels or two, basically.

Mrs. JOHNSON. All right. Thank you. That's helpful.

The other thing that I wanted to pursue a little further is in terms of this independent court. A number of you have suggested that you would prefer an independent veterans' court that is not part of the federal system. I would like to—and any one of you, Mr. Heilman or Mr. Lyngh or Mr. Egan—anyone of you who espouses this position is welcome to discuss the matter. I would like to hear from you a little bit more of what basis do you think one more level of appeal would be useful to the veterans?

There are already, as I recollect, three levels of appeal. What you basically would be doing with a separate court is within the same system adding on yet a fourth level of appeal. Outside of responding to the pressure that has resulted in the submission of this bill, what substantively do you think this would accomplish?

Mr. LYNGH. Well, if I may say, Madam Congresswoman, one of the thrusts in proposing the idea of an independent court of appeals is the fact that the Board of Veterans' Appeals now is part of the Veterans' Adminstration which leads to the feeling on the part of some, of course, that it is not totally independent and is influenced by the policies of the Administrator or the administration that happens to be in office.

Mrs. JOHNSON. So you would see the independent court—excuse me for interrupting, but I want to get this clear——

Mr. LYNGH. Yes.

Mrs. JOHNSON [continuing]. As an arm of the judicial department not of the VA, although its jurisdiction would be exclusive to veterans.

Mr. LYNGH. Well, to whom it would answer is questionable. I think that we in the Legion probably envision that, should this idea be pursued, the members of the court would, in effect, be, as we perceive them, administrative law judges. But the essential difference would be that they would have no association whatever with the Veterans' Administration. They would be set up in the executive branch of Government and would enjoy absolute and total independence from the Veterans' Administration, which, of course, would give them the advantage, you know, of making independent decisions which would enhance the veterans' assurance of a complete and independent and objective review of this case.

Mrs. **Johnson**. Do any of you have proposals that address the issue of appointment? Who would appoint them, who would they be accountable to, who pays their administrative costs? You know, I need to get a more tangible idea of what we are talking about.

Colonel **Passamaneck**. Mrs. Johnson, if I may suggest, we have a perfectly good working example of what undoubtedly everyone is talking about when they are talking about a court of veterans' appeals and that is the Court of Military Appeals, which is a court that is not really part of the judicial system, it's sort of administratively under the Department of Defense, but it's completely independent of the armed services, it consists of civilian judges who are appointed for a definite period of time, not for life—I think it is 15 years or something like that—with the consent of the Senate and so forth. Of course, the experience of that court—I was in military JAG for some 25 years and I can personally attest to the fact that it is a terrifically independent court. Most of the people in the Pentagon are most of the time up in arms over the way the court goes in an independent direction, making up its own mind on some very crucial issues. I think that we could probably foresee that that would be the same situation with the court of veterans' appeals.

Mrs. **Johnson**. I think it would be useful to this committee if those of you who espouse a separate court, an administrative court, could confer on whether or not the Military Court of Appeals is the kind of model that you are talking about and would meet your requirements, both in terms of appointment process and other aspects of it. Then at some point I would like to pursue further how this bill, Mr. Lyngh, differs from the previous proposals and why then it is more acceptable to the American Legion and perhaps you could address that in writing if we don't have time to go into it further today.

Thank you.

Mr. **Lyngh**. I would like to make just one quick point, Mrs. Johnson. Speaking for the American Legion, I would not like us characterized as espousing the idea of an independent court of veterans' appeals. We find it acceptable.

Mrs. **Johnson**. Thank you.

Mr. **Edwards**. Mr. Lyngh. Do you have a problem with the current judicial review for the Board for Correction of Military Records decisions?

Mr. **Lyngh**. We appear before the Board for Correction of Records constantly, Mr. Congressman. We provide advocacy before those boards.

Mr. **Edwards**. To your knowledge, do judges properly review those decisions? The BCMR makes decisions that are appealable to the Federal district court, is that correct?

Mr. **Lyngh**. Yes; I believe they do.

Mr. **Edwards**. And apparently the system works all right?

Mr. **Lyngh**. Yes, it does.

Mr. **Edwards**. So presumably judicial review of the decisions on veterans' affairs matters could work similarly well, because the situations are almost analagous, except under the BCMR, they are mostly officers who are seeking redress while under the Veterans' Administration they are enlisted people, generally speaking.

Mr. LYNGH. The Board for Correction of Military Records is not restricted to officers, Mr. Congressman. All former service people have access to those boards. Without having given it any great deal of thought, the character of cases considered by the two different agencies is fundamental.

Mr. EDWARDS. Mr. Lyngh, you have stated that you don't believe the courts will abide by the language of the judicial review legislation. What do you mean by that?

Mr. LYNGH. We simply mean, Mr. Chairman, that we have an activist judiciary, as the record of the past number of years has shown, and our feeling is that if the Federal judiciary finds itself in a position to deal with these cases, it will deal with them in an activist manner.

Mr. EDWARDS. Does it bother you that under the present system, with the Veterans' Administration, in effect, with its own board as the judge and jury and prosecutor and so forth; that it is in-house; and that there's no real independence?

Mr. LYNGH. No, because, as we indicated earlier, Mr. Chairman, the relationship of the Veterans' Administration to the veterans today is essentially a cooperative one and the adjudicative process that has been established, in our experience—and may I say that we handle thousands upon thousands of cases every year within the framework of the Veterans' Administration adjudicative system—that system militates in the direction of the veteran, in the main, which is not to say that you could not produce a case where justice has not been done; that's always true and it's always possible and we deal with those constantly, which is why some of our cases remain active in the adjudicative system over a period of many years, because if we get a case that we think we should have won, we just don't stop working on it until we win it. Sometimes it takes an awfully long time to get that done.

Mr. EDWARDS. Well, thank you very much.

Mr. Evans, did you want to ask a question?

Mr. EVANS. Well, there is one concern among some members of the committee. I'd just like to ask the representatives of the organizations in favor of judicial review if they see any changes in the current system of the Board of Appeals with the enactment of judicial review. In other words, are we going to keep that intact and just merely add the appellate court process? Do you see any changes in the administrative process with the addition of judicial review?

Mr. MAYO. Mr. Evans, we don't see any substantive changes that would be taking place. If anything occurred, I don't know whether you could say it would be more advantageous to a veteran or less advantageous if judicial review were available. We think the system would continue to operate just as efficiently as it does now.

Mr. EVANS. Colonel Passamaneck.

Colonel PASSAMANECK. I don't foresee any changes either. I think that the system of representation of veterans by primarily service organization representatives would continue. Of course, under the way the statutes are drafted the legal people don't really get into the picture until time for appeal and I don't think that would happen in any event because of the expense involved.

If anything, maybe the sense of fairness or the factual or the fact-finding processes of the Board of Veterans' Appeals might be a little bit more careful in terms of the veterans' interests than they are now because of the possibility of being reviewed by the courts, but other than that, I don't see any fundamental change.

Mrs. **Johnson**. Would the gentleman yield?

Mr. **Evans**. Yes.

Mrs. **Johnson**. Colonel, I find what you say really most surprising. I think if you know that you are going to be reviewed in court—I mean, if I knew it, and I knew that I might lose that case, I tell you, I would build the kind of case that I needed for review and I think there is a very real danger. One of the things that concerns me, having been really quite closely associated with the American Legion's service organization, I think there is a very real possibility that we will see as a result of this change a pushing out of the voluntary advocate, because when you go to judicial review you can't afford for your advocate to have made a mistake.

Colonel **Passamaneck**. To some extent, Mrs. Johnson, that will happen, and one of the valid objections to judicial review, which we recognize, is the fact that it will, and I think I alluded to it in my statement, it will probably create a substantial financial burden on the service organizations, which will have to go out and hire some lawyers in order to provide this service or at least assist in providing it to their clients as they now do with nonlegal representation.

The answer is, "Yes, I think we probably will get some of that, but I don't think they are going to displace the system as it exists completely." What it will amount to is that for some small percentage of cases, you will have to have some legal talent around.

Mrs. **Johnson**. I do think it's terribly important, Colonel, or I wouldn't interrupt again. It's terribly important for this committee to be absolutely as rigorously realistic as possible about the effect of these changes because I think in the end the service organizations that I know, the veterans' posts that I know, the American Legions in my district that I know, their membership are factory workers and people like that. There isn't any financial way in which they can raise a lot of money to alter dramatically the nature of their advocacy and service organization to fund it to a level where it could possibly provide the paid advocacy that this system may lead to.

Now, I am not saying that it will, but I think it's a very real possibility. If you look at what has happened in other areas and what's happened when we move things into the judicial setting and the legal technicalities, I think we have to consider that very seriously, and I think that's something that all of the organizations ought to come back to us with further information about together with evaluations from the experience of their service representatives and the advocacy involved.

How do you see your people functioning in a judicial setting?

Mr. **Egan**. May I make just one comment, Mrs. Johnson? Notwithstanding the fact that we seem to be the only organization that is not currently in support of judicial review, were that to happen, we would certainly hope that we weren't the only ones defending the Board of Veterans' Appeals. Indeed, if backlog in the courts is an issue on which we can disagree, it certainly is an issue worth addressing. The sustained existence of the Board of Veterans' Appeals is certainly one way to guarantee that the courts are minimally backlogged, if we can assume that they will be backlogged, and that, of course, with the understanding that we do not currently support judicial review.

Mr. **Heilman**. I would like to make a comment, if I could, with regard to the question. Of course, if judicial review should be enacted, if you should put it in the Federal district court system, as I pointed out earlier, service organizations would not be permitted to—simply because most of them do not have attorneys as their service officers—would not be able to provide that representation in the Federal district court system.

I would also agree with you that any time you have oversight and any time you have someone looking over your shoulder, that's going to affect the decisionmaking process of the individual group involved and BVA probably would be quite aware that their decisions would be subject in the Federal district court system or by the court of veterans' appeals and whether that would be good or bad or would have both positive and negative effects that would cancel out, I really don't know.

But I want to point out one concern that we have with this legislation that relates to the lifting of the attorney fee limitation. I think that's a consequence that this committee should give very serious consideration, and, as I said before, we oppose it. The attorney fee limitation, as was pointed out, was placed into effect years and years ago when attorneys were perhaps taking advantage of veterans in filing for claims. Ten dollars, 50, 60 years ago, even though it seems a pittance today, a $10 legal fee was common then. I don't think the $10 limitation was put in to shut out attorneys. Of course, with the passage of time, that is what has occurred.

There's no doubt that a $10 legal fee has gone the way of a 5-cent cigar. It's ridiculous. I also want to point out to the committee that in the interim since this fee limitation was imposed, the service organizations have developed their qualified corps of service officers to provide, free of charge, effective representation to veteran claimants. Somewhere between 80 and 85 percent of all VA claimants have the representation of the various service organizations. The other 15 percent either have no representation or VA representation in the form of contact officers at the local level. Approximately 3 percent do have the representation of private attorneys in terms of those who accept the $10 fee or more, less do it as a part of their pro bono caseload.

If you look at the statistical data from the Board of Veterans' Appeals, you will see that the win-loss ratio of cases where you have service organization representation and private attorney representation is almost identical. Some years the service organizations do better than the private attorneys by a percentage point or a fraction thereof. In other years it's the opposite.

Keeping in mind that the allowance ratios are fairly similar, I want to point out that service organizations are required by law to provide representation. They will provide representation in any appeal that a claimant initiates, and if you look at the BVA caseload you will find that many, many cases do not have merit. That is a fact that is acknowledged by all.

The service organizations, although they will counsel in terms of what are the possibilities, what are the merits of the case and do, in fact, you have a chance to win your claim, if you go to BVA—they will provide that counsel. But if the claimant still wishes to appeal the service organization will provide representation. We don't pick and choose as attorneys do and if we did I believe you would find that our allowance rate would be far in excess of the 13, 14, 15 percent that it is today.

If you modify the attorney fee, if you let private attorneys into VA proceedings, you are, in effect, taking dollars out of the compensation program, taking dollars out of the pockets of VA claimants and putting it into the pockets of private attorneys. We are talking about hundreds and hundreds of millions of dollars. I believe this committee should act in what it perceives to be the best interests of the VA claimants.

If you enact judicial review, by all means, provide for reasonable legal fees in the judicial review process that you enact. But there is no need and it is not necessary to open the door to private attorney representation and payment of fees in VA proceedings.

Mr. EDWARDS. I believe that the time belongs to Mr. Evans.

Mr. EVANS. I am done, Mr. Chairman.

Mr. EDWARDS. Mr. Staggers.

Mr. STAGGERS. Thank you, Mr. Chairman.

For Mr. Lyngh and Mr. Egan, there has been some talk of the cooperative spirit and I am sure that for the most part that does exist. My question would be: Wouldn't you agree that there is need for more judicial review in certain kinds of cases such as agent orange or radiation or post-traumatic stress, those type of cases?

Mr. LYNGH. No, sir, I would not suggest that in this entire adjudicative process that either the Veterans' Administration or the service organizations or the Congress begin to select out certain categories of claims.

Mr. STAGGERS. I am not suggesting that either. What I am suggesting is that wouldn't you agree that there is a need in certain kinds of cases for judicial review?

Mr. LYNGH. No, sir.

Mr. STAGGERS. Thank you. No further questions.

Mr. EDWARDS. Are there further questions?

The gentlewoman from Connecticut.

Mrs. JOHNSON. Thank you.

Mr. EVANS. Mr. Chairman. I wonder if for the clarification of the committee members if we could get some information on how attorney's fees would be handled under the bill. I think that would clarify some of the problems.

Mr. EDWARDS. Without objection, the information will be provided.[1]

Mr. EVANS. Thank you.

Mrs. JOHNSON. I am going to ask for information, too. I would like for each of you to give the committee some written indication of the need that you see for this legislation. I think it is important for us to see precisely where does this come from, what groups need it, is it a matter of some of the complexities of agent orange and atomic addressing the needs of those particular veterans groups. If that is where it comes from there may be other avenues that are preferable in which to address those problems.

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[1] See p. 338.

Outside of those categories, are there large groups that are complaining to you that they don't feel that they have been treated fairly by the Veterans' Appeals Board, and if so, let's get documentation of exactly how the current system is failing. Most of the testimony has been directed at the theoretical need for appeal and the structure that that appeal should take, the form that appeal process should take, as for instance a Federal or a separate or whatever.

I want to know more from your experience, and I think this is best provided to the committee in writing. We need documentation of any need for change. In addition, I would like to have some further assessment from you, brief but after today's hearing so that you have had a chance to kind of weigh it with your people, of what you think the impact, long range, of setting up a judicial review procedure would have on the service organization representation service that have been so outstanding in performing at very, very low cost for all veterans.

If you would get back to us on those two counts I would appreciate it very much.

Mr. EDWARDS. I think that is an important request to give the committee some indication specifically of incidences that have taken place and the number of which where redress was unfairly denied.[1]

If there are no further questions, we thank the panel and——

Mr. EVANS. Will the questions be a part of the record?

Mr. EDWARDS. Yes, the questions will be a part of the record.

We will dismiss the panel and thank you very much.

We will officially adjourn the hearing.

[Whereupon, at 11:30 p.m., the subcommittee was adjourned.]

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[1] See American Legion response on p. 176.

JUDICIAL REVIEW OF VETERANS' CLAIMS

TUESDAY, JULY 26, 1983

House of Representatives,
Subcommittee on Oversight and Investigations,
Committee on Veterans' Affairs,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9 a.m., in room 334, Cannon House Office Building, Hon. G. V. (Sonny) Montgomery (chairman of the subcommittee) presiding.

Present: Representatives Montgomery, Edwards, Hall, Penny, Rowland, Evans, Hammerschmidt (ex officio), Hillis, Solomon, and Sundquist.

Also present: Representatives Daschle and McEwen.

OPENING STATEMENT OF CHAIRMAN MONTGOMERY

Mr. Montgomery. Good morning. The subcommittee will come to order.

We will continue receiving testimony on the issue of judicial review on veterans' claims. I think the last meeting we had was very helpful. I want to thank the members for being here, and also the witnesses for adding to the public record by being here and answering questions.

Mr. Solomon, since Mr. Hillis is not here, do you have any comments this morning before we recognize our first witnesses?

Mr. Solomon. Thank you, Mr. Chairman.

Bud Hillis, the ranking member on the subcommittee, has been delayed but will be here shortly. I would like to read his statement into the record, if I might.

Statement of Hon. Elwood Hillis, a Representative in Congress From the State of Indiana

Mr. Chairman, on July 21 we had a good hearing on this very complex subject. Hopefully today will be the same. If I have gleaned anything so far from these hearings and from the testimony—and almost all of the testimony has been excellent—it is that we have a very wide difference of opinion about the subject of judicial review of veterans' claims. The American Legion does not favor it but is going to consider it again at its forthcoming national convention. It might consider favorably the idea of a Veterans' Court. The DAV likes the same idea. The VFW wants only law and regulations considered by courts and not facts, and AMVETS seem to agree. The Vietnam Veterans of America seem to want total review by the courts, so does the American Veterans Committee and so does an organization called Veterans Due Process, Inc.

The Administrative Conference of the United States has no official position, but in 1978 seemed to feel that judicial review may be a cure not called for by an undiagnosed ailment. The American Bar Association wants rather complete judicial review, and Dean Frederick Davis of the University of Dayton School of Law makes a persuasive argument for the Association.

The Department of Justice and the Veterans' Administration argue in great detail for the status quo. Through all of this, the Board of Veterans' Appeals of the Veterans Administration is pictured at one and the same time as doing a good job in a difficult posture while its decisions, which are generally final and not reviewable by the courts, are depriving veterans of a so-called constitutional right of a day in court with respect to claims for disability compensation or other benefits. It is a small wonder, Mr. Chairman, especially in view of the fact that the other body of the Congress has for the third time already passed a judicial review bill for veterans, that we have a most difficult situation before us. Do we or don't we decide to pass a law out of this Congress granting judicial review for veterans?

For my part, Mr. Chairman, I want to study all of the testimony presented by our witnesses this morning. They are a knowledgeable and informed group and each most sincere in their opinions. I look forward to hearing from each of them.

Mr. Chairman, that is the statement of Congressman Bud Hillis.

Mr. MONTGOMERY. Thank you.

I would like to have my brief statement put in the record, also.

[The statement of Mr. Montgomery appears at p. 177.]

Mr. MONTGOMERY. The Chair would like to recognize the ranking majority member on the committee, Mr. Edwards, for any comments that you would like to make.

Mr. EDWARDS. Thank you, Mr. Chairman. Again, I am very pleased and I know most of the members of this subcommittee are very pleased that we are having these important hearings. As the statement read by Mr. Solomon points out, there is a great deal of controversy about this issue. I know that our friends from the VA are going to testify that it is not needed, but there are a lot of witnesses who are going to disagree with them strongly. So there is an issue here that should be resolved and must be resolved, and I am looking forward to hearing from all the witnesses.

Mr. MONTGOMERY. Thank you very much.

Mr. Hammerschmidt, do you have any comments?

Mr. HAMMERSCHMIDT. No, Mr. Chairman. As you know, I don't serve on this subcommittee on a regular basis, only ex officio. I am very interested in this subject. I think it is one of the most important matters probably that our committee is going to consider all this year, so I am deeply interested in the subject matter.

I have no further comments.

Mr. MONTGOMERY. Thank you for being here.

The Chair would like to recognize Mr. Murphy, who is General Counsel for the Veterans' Administration. John, I would like for you to introduce the other witnesses with you this morning at the witness table.

STATEMENT OF JOHN P. MURPHY, GENERAL COUNSEL, VETERANS' ADMINISTRATION, ACCOMPANIED BY KENNETH E. EATON, CHAIRMAN, BOARD OF VETERANS' APPEALS; DOROTHY L. STARBUCK, CHIEF BENEFITS DIRECTOR; AND EDWARD LUKEY, DEPUTY ASSISTANT GENERAL COUNSEL

Mr. MURPHY. Thank you, sir.

On my left, of course, is Dorothy Starbuck, the chief benefits director. On my immediate right is Mr. Edward Lukey, deputy assistant general counsel. On my far right is Mr. Ken Eaton, chairman of the Board of Veterans' Appeals.

I would like to begin by expressing our appreciation to the committee for the opportunity to testify and present our views on this important subject of judicial review.

I think it is fruitful and profitable to begin by identifying the issues as well as briefly summarizing what the Veterans' Administration presently does in the adjudication of claims for benefits.

The issue, quite simply stated, is whether the addition of a layer of judicial review to the VA's claims process would be beneficial to veterans as a whole. To understand this issue, as I mentioned, I would like to briefly summarize how we now determine claims, first with a statement of two basic governing principles that are employed by the agency.

The first is it is the agency's mission by law and by design to afford veterans all benefits to which they are entitled by law. Toward this end, as another general principle, the Veterans' Administration has always given the benefit of the doubt to the veteran in resolving claims.

Our claim process has two outstanding features. First, it is nonadversarial, and second, it is informal. The procedure begins with the filing of a claim. With the filing of the claim, the VA itself attempts to garner and obtain the evidence for the resolution of the claim. If the VA is not able to obtain all the evidence, or if there are other questions that arise, the veteran is requested to submit any additional evidence he wants. He is also advised of what evidence would be helpful.

The evidence in our process can be a long way from what would be required in court. Hearsay evidence is readily acceptable, as is evidence from numerous sources that wouldn't ordinarily meet the test of the rules of evidence in the judiciary.

In the process the claimant or the veteran is assisted both by VA employees and service organizations. He can obtain a hearing on request at literally any stage. When the evidence is acquired or accumulated and then reviewed, a decision is rendered in the first instance. If the decision is to deny the claim at that point, the veteran is provided a notice of the decision with a notice of hearing and appellate rights. At that point, if the veteran chooses to go forward, he files a notice of disagreement with the agency—again reflecting the informality of our process—consisting of a statement to the agency that he disagrees.

At that point in time the agency again reviews the claim and a number of claims are changed or modified in that review process. If a denial is still the decision of the adjudication level, a statement of the case is prepared. The statement of the case will set forth the reasons, rationale, and evidence upon which the decision is based and will be provided to the veteran.

Again, the veteran may choose whether he wishes to go forward. If so, he does so by an appeal to the Board of Veterans' Appeals. The Board of Veterans' Appeals is a "de novo" review—and I think it may be important to digress a little bit and describe what "de novo" review is. What that means is the Board of Veterans' Appeals completely reviews the case again. By this time, the veterans case has been reviewed on three occasions. The Board is also totally independent in its deliberations. The Board and the agency, has always adhered to very liberal rules, allowing the reopening and the reconsideration of claims denied by the Board.

I think the process I have described is very difficult to categorize in any other way but extremely favorable to veterans. It reflects a preference for veterans which is, in fact, the policy of the United States, always has been, and hopefully always will be. Veterans, unlike the allegation that has surfaced in judicial review, are not treated as second-class citizens. They are treated as first-class citizens. In the administrative process, they are given procedural and substantive rights not enjoyed by other citizens.

This process is not criticized or roundly condemned. As a matter of fact, it is lauded and praised. It is considered to be an effective pro-veteran process that is fair and works well. The process also does not either legally or factually violate or impinge in any respect the due process rights of veterans. From a legal point of view, it has been held to comply fully with the due process requirements by the courts, the branch of Government charged with making those determinations. We are not addressing an issue of due process. What we are addressing is an issue of preference or policy, if you will, not law.

In this context, with the procedure that is generally, almost unanimously considered favorable and advantageous, I think the analysis must go to what are the advantages and what are the potential disadvantages of subjecting the claims process to judicial review and another layer of decisionmaking. The principal advantage argued is that some decisions would be reversed by the judiciary. I think that we have to concede that that is true. But in reviewing that statement, there are two things that need to be considered.

First, we are dealing with issues of judgment. Some decisions will be reversed, not because they are wrong, but because of the fact that on judgment decisions different people may see things in different ways. It is well known and fairly well documented that in administrative review there is a strong propensity of the courts to substitute their views for those of the agencies. Given this factor, the argument that there would be reversals and, therefore, is favorable to veterans, extrapolated out, would justify almost repeated reviews by a procedural process to a point in which 100 percent of the claims could be granted. That would just be based on disagreements among reasonable people as to how they may view cases.

The other problem in my mind, a greater problem with the argument of this advantage, is that it misses the issue. The issue we must address, of necessity—and I believe it is an appropriate issue for Congress to address—is what is more beneficial to the veterans as a class or a group. If a reversal in an individual case is more favorable to a veteran, which, of course, it would be, you must ask would that reversal then cause or have an impact that would result in something being more unfavorable to more veterans. In standard parlance, we have to be concerned with the greatest good for the greatest number.

The disadvantages of judicial review are substantial. In a way, it is difficult to sit here and argue this position because, instead of arguing theory, I have to argue practice and, in my view, what would be the basic reality of what would in fact happen if judicial review were imposed upon the veterans adjudicatory process.

I think there must be appreciated a substantial risk of a procedure and process that would require the formalization of adjudication procedures and practices. It is not realistic and, in my opinion, cannot reasonably be argued that an agency or an individual can be put in a defensive posture, required to defend its decisions, and not be affected and become defensive. Requiring to defend our positions will provide incentives for stricter adherence to rules and greater documentation of cases against the veteran. This will force us to be adversarial or more adversarial. It will force us to formalize.

I think it would be well to keep in mind that as a practical matter the court review would be review on a record which would require us to very carefully document and become very attuned at how to deny cases.

Another issue that is not, in my opinion, paid much attention to is the effect of precedence. The U.S. district courts are courts of record that establish precedence. Although estimates have to be soft, we would estimate that the agency would prevail in 80 percent or more of the cases. In legal terms, what that would mean is 80 percent or more of the precedence would be against the veteran.

The other factor about precedence in which we have learned a lot from the Social Security Administration's experience is that, like the Social Security Administration, we are attempting to administer a national body of law or national service rendered the country. Subjecting our claims process to the 94 district courts on an infrequent, basically uncontrollable review process, will result, and has resulted in other schemes, in inconsistent precedential decisions causing the basic legal rights of the veteran to vary from locale to locale. Consistency will not be very maintainable and will erode over time.

Given this situation, it is simply our position, that given our process works well, works fair, and works efficiently, and given that there is substantial risk of adversely affecting veterans as a whole, there is no basis to take the risk and there is no basis to subject either the agency or our veterans to the uncertainty and possible adverse consequences.

I would like to end this statement just with a comment that we are in a fairly difficult situation, because the arguments that we must meet are largely theoretical, and as alluded to earlier in one of the statements, can't help but have the feeling that we're addressing a cure in search of an illness.

Mr. Chairman, thank you very much. We would be pleased to answer any questions.

[The statement of Mr. Murphy appears at p. 178.]

Mr. MONTGOMERY. Thank you, Mr. Murphy. We certainly know where you're coming from. Sometimes with witnesses we don't know which side they're on, but there is no question about you. I think it was very strong testimony.

I would like to recognize Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman, and thank you, Mr. Murphy.

Your testimony states in effect, that there is no illness, so we shouldn't enact a cure. Then why do you think the veteran organizations, and presumably even the American Legion will join the parade, are asking that this process be made a part of our law?

Mr. MURPHY. Well, first let me make a comment. I don't think that the veterans organizations as a whole are anywhere close to unanimity. Even those who have gone the way of looking toward some form of judicial review have various degrees and differences in their positions as to what that review or form should take.

More directly answering your question, I think there is a problem that there is a tendency, quite understandable in my opinion, to view the problem as an individual veteran's case. If you view the case that way, then quite obviously the more reviews a veteran may have, the more chances he has to prevail. Looking at it that way, you would say or tend to feel "Well, this is good for veterans."

The last part of my statement is actually where I have the problems. The more accurate way is to say this might be good for "a veteran." Our problem is, we believe most firmly, that it would not be good for veterans in the plural. I think if an analysis was given as a veteran-wide issue, the service organizations may have greater difficulty. I think that is the issue identified by the American Legion, and properly so.

Mr. EDWARDS. Mr. Murphy, do you have a problem with the current judicial review available for the Board for Correction of Military Records decisions? Those decisions through the BCMR administrative process are reviewable.

Mr. MURPHY. In the Department of Defense you're referring to, Mr. Edwards?

Mr. EDWARDS. Yes.

Mr. MURPHY. I would have to state, to be honest with you, that I am aware those are reviewable. I am not aware, and I don't have any expertise, as to the nuances and ins and outs of the correction process for reviewing military records. On that basis, I really can't answer you other than to say, to my knowledge, I don't have a problem—though my knowledge is limited.

Mr. EDWARDS. Thank you.

You apparently have some problems with the social security right of review, where up to perhaps 40 or 50 percent of the cases are reversed. Your testimony is that these reversals really shouldn't take place, I guess, but apparently do take place in the judicial system, because of what you describe as a strong inclination to overturn decisions of administrative judges.

Is that really your testimony, that courts have that sort of attitude? That sounds rather irresponsible, doesn't it?

Mr. MURPHY. The reversal rate is about 20 percent in the judiciary. It's about 50 percent inside the administrative process. Do courts substitute their judgment? Yes.

I believe we testified about this in the Senate. It is not a novel, legal understanding that scopes of review are not terribly meaningful beyond the more standardized or better known ones of preponderance of the evidence or beyond a reasonable doubt. They are largely semantic. Anybody, judges included, will have a propensity in reviewing a record to substitute their views for those of another decisionmaker. I think that is true if you reviewed decisions of mine, and it is true if I reviewed decisions you made.

Mr. EDWARDS. Do you disapprove of judicial review in discrimination cases, racial discrimination in employment matters?

Mr. MURPHY. No.

Mr. **Edwards**. Well, why wouldn't you approve the same kind of review that the Veterans' Administration gives these veterans' cases?

Mr. **Murphy**. They are not at all similar cases.

Mr. **Edwards**. Are you saying all veterans' cases are the same or similar?

Mr. **Murphy**. No. I am saying veterans' cases are not at all racial discrimination cases. You can't equate them.

Mr. **Edwards**. Don't you think veterans feel just as strongly that they have merit in what they claim as the people who feel they are discriminated against in employment for racial or sexual reasons?

Mr. **Murphy**. I believe the veterans feel strongly about their claims, and I believe that the existing administrative process is fair and adequate and fully, even preferentially, extremely preferentially, gives the veterans a fair view of their claims.

Mr. **Edwards**. Thank you, Mr. Murphy.

Mr. **Murphy**. Thank you, Mr. Edwards.

Mr. **Montgomery**. Mr. Sundquist.

Mr. **Sundquist**. Thank you, Mr. Chairman.

In reference to social security, in your testimony I see here a concern that one of the advantages of the system now is its informality, that a veteran can do it essentially without any legal cost.

Mr. **Murphy**. That's right.

Mr. **Sundquist**. Is there a system in which it would be possible for a veteran to still adjudicate it without having the assistance of an attorney? You don't say that.

Mr. **Murphy**. Our system now does that, as you have correctly mentioned. If you have court review, of course, because of the rules of unauthorized practice of law, only attorneys could go into court. So with judicial review, my answer would be no.

Mr. **Sundquist**. One of the problems that I hear every week when I'm home in courthouse sessions from social security recipients, is that only those who can afford legal counsel or who are wealthy can, in fact, proceed—not necessarily wealthy, but have some money—can proceed in the social security claims system. I think you make a good point in that regard, that we certainly don't want to get bogged down in a way that would make all our veterans dependent on having to have an attorney and, in fact, when there is a favorable ruling made, a portion of that money would then have to be paid to an attorney. But, on the other hand, I do hear frustration in terms of the process itself.

Do you have any suggestions as to how, if you don't want to change the system, how we can make the system better?

Mr. **Murphy**. In my view—and I will have to say this is mostly personal at this time—in my view, I think the way to make the system better is to basically insure that it has the adequate resources to do the job.

We have pending before Congress, and it has been passed by the House of Representatives, a bill to expand the Board of Veterans' Appeals so that claims can be adjudicated or determined at the appellate level faster and so that a growing backlog can be turned around and decreased. I think those are the shape of things that would improve our system now. I don't think it's a problem of process or procedure in the system; it's a problem of adequate resources.

Mr. **Sundquist**. One last question, Mr. Murphy.

You mentioned that precedence could be a dangerous problem in the legal system as it relates to veterans. Could it also not be helpful?

Mr. **Murphy**. Yes, it could. Precedent, however, cuts both ways——

Mr. **Sundquist**. Well, you only mentioned one of the ways and I wanted to make sure that we understood it could also cut the other way.

Mr. **Murphy**. Yes, I would agree with that. My point is, if you accept our estimate—which I concede it is difficult at this point in time to give with any degree of certainty—that we will prevail in 80 percent of the cases, then I think it is obvious there is a much greater chance of adverse precedent than there is of favorable precedent.

Mr. **Sundquist**. Why would you want to prevail in 80 percent of the cases if you're not doing it now?

Mr. **Murphy**. Well, in the judiciary this would be 80 percent of the cases on appeal.

Mr. **Sundquist**. But why would you want to do that if it's right?

Mr. **Murphy**. Why would we want to?

Mr. **Sundquist**. Yes.

Mr. **Murphy**. Because we would be arguing that it would be in accordance with the law.

Mr. **Sundquist**. But yet you're not really that way now, are you? I mean, 80 percent of the cases aren't turned down now, are they?

Mr. **Murphy**. No. I don't know that.

Miss **Starbuck**. If I may, Mr. Sundquist, in the appeal process, those cases that are granted by the Board as opposed to a decision that has been made in the regional office, is running only about 13 percent—is that correct, Ken?

Mr. **Eaton**. Yes, that's true.

Miss **Starbuck**. So that the decisions that are made in our regional offices, which is the initial point of decision on a claim, are in fact upheld in excess of 80 percent of those cases that appear before the Board of Veterans' Appeals.

Mr. **Sundquist**. Thank you.

Thank you, Mr. Chairman.

Mr. **Montgomery**. Before calling on Dr. Rowland, just for the record, so we will be clear in our minds, people have been using different percentages pertaining to this situation.

Of the claims that are made at the local regional office level, what percentage is that, and then what gets up to the Board of Appeals, just so we can be sure we have the correct figures. Mr. Eaton?

Mr. **Eaton**. Yes, sir, I believe I can answer that. Of all the claims filed in the regional offices, only about 2½ percent of those claims are appealed. Now, that amounts to some 60,000 appeals all together. Some of them are sorted out for one reason or another.

Now, out of that 60,000, with some withdrawn, some allowed, and so forth, at the regional office level, we at the Board of Veterans' Appeals will allow about 13 percent of those. Another 14 or 15 percent will be remanded. After we remand a case and ask for further development, they may change their mind and allow 30 percent of those. So really, during the appellate process, 25 percent, approximately, of all those 2½ percent of the claims are allowed during the appellate process.

Mr. **Montgomery**. Even when it gets up to you, the 2½ percent, which are all claims that have some problems that were turned down at the regional level, 25 percent of those that come to you are approved?

Mr. **Eaton**. No, I guess that wouldn't be correct. I picked that 2½ percent out of the total number of claims filed. Many of those are allowed as well. I do not have a figure as to—you see, there are millions of claims filed every year, and there are 60,000 appeals, which is about 2½ percent of the total claims filed, but not of those denied. I didn't want to mislead you there.

It used to be like 1½ percent of appeals; now it's 2½ percent. But it is about 60,000 notice of disagreements filed, and we will eventually get about 40,000 at the Board. Between the regional office and ourselves, we will allow 25 percent of those cases all together.

Mr. **Montgomery**. Miss Starbuck, what percentage of the claims that are filed are eventually approved?

Miss **Starbuck**. Mr. Chairman, I would have to supply that for the record. I don't have those that are allowed as against those that are disallowed. But I will try to provide that for the record.

[Subsequently, the Veterans' Administration furnished the following information:]

Mr. Chairman, we don't have any reports that would allow me to provide that information. Our computer system was designed primarily as a payment system rather than as a statistics-collecting system. It can give us some data on cases in which we are making payments and indirectly, through our end products, it can tell us how many Notices of Disagreements are received. However, after the initial claim, denials of benefits are not made input nor, unless they affect the amount of the payment, are grants of benefits. It would take a manual review of millions of claims folders to develop what percentage of claims filed are eventually approved.

Mr. **Montgomery**. Dr. Rowland.

Dr. **Rowland**. Thank you, Mr. Chairman.

Let me be sure I understand what Mr. Eaton said. Are 25 percent of the 2½-percent reversed?

Mr. **Eaton**. Right, at one stage or another of the appellate process.

Dr. **Rowland**. Are changed from what the Veterans' Appeal Board did?

Miss **Starbuck**. It might be helpful—When a case goes to the Board of Veterans' Appeals and they review it and feel that it needs perhaps to have further development at the local level, they will go through a process called remand. They will send it back to the regional office and say, "Please have this veteran examined for a specific purpose; please see if you can get from some source other evidentiary documents which would be helpful in the decision process." Those are the 14 or 15 percent that the Board sends back to the regional offices.

In the regional office following development of additional evidence, or the collection of additional information, the regional office itself will make a favorable decision to the veteran. For those cases on which the Board of Veterans' Appeals makes a decision on the basis of the record that it has, and without any further development, that allowance rate is about 13 percent. Of those that go back to the regional office for further development by remand, there is an allowance rate at the regional office level that would total up to the 25 percent while a case is in the appellate process.

Dr. **Rowland**. Thank you.

Mr. Murphy, do you know of any group in our society that does not have the prerogative to appeal to the Federal courts, other than veterans? I had asked the question once before as to whether or not people in active military service had the right of appeal to the Federal courts and I have since been told that they do have the right of appeal. Even in a court-martial, they can appeal to civilian courts to overturn the court-martial decision.

Is there any group, other than veterans, that does not have the prerogative to appeal to the Federal courts?

Mr. **Murphy**. There are other statutes that preclude judicial review. Some of them are listed in my testimony. One of them is the Federal Employees Compensation Review.

The military appeals, I might mention, are to a Court of Military Appeals.

Dr. **Rowland**. I beg your pardon. To what?

Mr. **Murphy**. A Court of Military Appeals.

Dr. **Rowland**. Then people in the military do not have the prerogative to appeal outside of the military?

Mr. **Murphy**. To be honest with you, it depends on the issue. But in situations they have the prerogative to appeal to a Court of Military Appeals but not to a U.S. district court.

Dr. **Rowland**. Well, in that respect, then, would the establishment of a special Court of Veterans Appeals satisfy some or all of the objections of the VA to Federal court review?

Mr. **Murphy**. One of my major concerns would be satisfied, to be honest with you, and that would be the risk of inconsistent precedent, because you would, by definition, in that situation have a single centralized body that presumably—and I am sure it could be organized so that it would maintain an acceptable degree of consistency.

In that context I would like to mention, however, that that is basically what we have now.

Dr. **Rowland**. I was speaking about beyond the Veterans' Appeal Board.

Mr. **Murphy**. Well, my problem with that is that, given that is essentially what we have now, it is just a layer, just more review.

Dr. **Rowland**. You mentioned earlier that veterans enjoy some rights and privileges that other citizens do not enjoy now. Could you expand on that a little?

Mr. **Murphy**. My comment was made in the context of the procedure and process that we use. I think you would have to search long and hard to find a procedure, if there is one anywhere—and I'm not aware of it—that is so directed toward the granting of claims. With the benefit of a doubt, our mission being to give every veteran every right they are entitled to by law, basically a minimum of three—and in the remand situation discussed earlier, four or more—internal reviews, it is a very, very favorable system, very much directed towards the granting of claims.

Dr. ROWLAND. Thank you, Mr. Chairman.

Thank you, Mr. Murphy.

Mr. MONTGOMERY. Thank you.

Mr. Evans.

Mr. EVANS. Thank you, Mr. Chairman.

You are indicating that allowing judicial review of VA decisions is going to create the prospect of inconsistent determinations by 94 district courts around the country. But in view of the fact that 94 district courts already regularly decide cases involving Board for Correction of Military Records decisions and military disability retirement, why should Congress be concerned with the prospect of inconsistent decisions on VA disability claims?

Mr. MURPHY. Well, for two reasons. One is, in the cases you're referring to, we're talking about an extremely small number of decisions, so that inconsistency of precedent has a minimal impact.

In our situation, with a larger number of cases, particularly over time, the inconsistencies will be inconsistencies of precedent which will cause an alteration or variation from geography to geography—basically the territorial jurisdiction of the district courts—as to what a veteran's rights are. Quite literally, it is not only possible, it is likely that we will have a situation of an entitlement that exists in Los Angeles, Calif., that does not in Chicago, Ill.

Mr. EVANS. Are you aware of any significant inconsistencies in court decisions on military disability retirement?

Mr. MURPHY. No. I am aware of quite a few in social security, which is much more analogous to our situation.

Mr. EVANS. But specifically on military disability retirement, you don't have any?

Mr. MURPHY. I don't have that information so I, quite honestly, couldn't directly answer your question.

Mr. EVANS. I would like to bring up a specific concern addressed in the statement submitted by the Vietnam Veterans of America. They refer in their statement to the court case of a veteran named Norman Elmore Cooper. Mr. Cooper, 2 years after discharge from the Navy, appled for service-connected disability benefits and was rated as 20 percent disabled. Mr. Cooper was dissatisfied with the 20-percent rating and hired a lawyer, who applied to the Board for Correction of Military Records for disability benefits which are administered by the military departments.

The Correction Board used the VA schedule for rating disabilities, which is used in military disability decisions, and determined, as the VA had determined, that Mr. Cooper was 20 percent disabled.

But because there was court review of Correction Board decisions, Mr. Cooper went to court and the court ruled that the Board's 20 percent rating was arbitrary and capricious and ordered that the veteran be classified as 40 percent disabled.

So my question is, Mr. Murphy, why should the average veteran be precluded from going to court on a VA decision when veterans like Mr. Cooper, who are able to hire attorneys and get court reviews, simply by applying to the Correction Board? You keep saying that, as a whole, veterans are well served. We have one example of a veteran's disability rating being increased by 20 percent.

Now, what bothers me about this as a whole is that you are neglecting examples such as this in which individuals are not well served unless they have judicial review. You add these individuals up over a period of time and it creates a bad image for the VA; that they are not treating at least a minority of the veterans.

Mr. **Murphy**. Well, I would have to disagree with the analysis of the case. First of all, the issue in the case was not a veteran's disability determination. It was not a VA decision. The issue in the case was a separate legal process which exists in the Department of Defense concerning when an individual is eligible for retirement disability from the military. Thirty percent under that law, by the way, is a magic disability rating. It makes a determination between eligibility for permanent disability retired pay and for temporary severance pay.

The Secretary of the Navy in that case rated Mr. Cooper at 20 percent after an involved internal process. In that process, the military is directed by their law to apply our rating schedule. However, those are not veterans compensation determinations. They do use our rating schedule. That would be no different than if their law directed them to apply the workers' compensation ratings schedule of any given State.

The Veterans' Administration's rating in that case, because the individual, Mr. Cooper, applied for both, was 20 percent service connected for an ulcer condition and nonservice connected for an emotional or psychiatric condition, the second being on the basis that it was not incurred or aggravated in service. That is a veterans' issue and a veterans' claim issue. That is not a retirement disability issue.

What the court indicated—the Court of Claims, by the way—in making a determination concerning Mr. Cooper's disability, which did not involve the incurred or aggravated in-service legal requirement, the Navy's 20 percent rating was too low. It really doesn't involve veterans' claims. You can go for a disability retirement in the Defense Department and they can rate you and we can rate you higher or lower, or we can say it was not incurred in service.

Mr. **Evans**. The principle of this case is; had he been relegated to having an administrative board make its decision, without judicial review, Mr. Cooper would still have 20 percent. Would he not?

Mr. **Murphy**. Yes.

Mr. **Evans**. So with judicial review he is able to up his——

Mr. **Murphy**. He may still have 20 percent from the military.

Mr. **Evans**. My point is that he would never have gotten 40 percent disability rating had it not been for judicial review; is that correct?

Mr. **Murphy**. That's true. It is not our position——

Mr. **Evans**. Not that the facts may differ between this particular case and the average veteran's case going through the Board of Veterans' Appeals, but the fact is that judicial review, for whatever reasons, allowed him to get a higher rating. And if there was a decision made in BVA that other veterans had this right as well, maybe they would not have the same factual basis for overcoming this decision. If there was a misapplication of precedent or VA rulings, they would have the same kind of remedy available.

Mr. MURPHY. It is not our position that perfect, unquestioned justice is arrived at in every VA decision. I would mention that it is entirely possible that it is assured to happen, that if you have judicial review a case like Mr. Cooper's can be affirmed by the courts. It would be very often affirmed by the courts because of the differences in judgment.

Mr. EVANS. Right.

Mr. MURPHY. If that can happen in the courts, then your argument is an excellent argument for having the district courts again reviewed by another district court. We can go on and on. I am just trying to get across the message that perfect justice has its price, and its price is to the whole.

Mr. EVANS. My time has expired, Mr. Chairman.

Mr. MONTGOMERY. Thank you.

Mr. Hillis.

Mr. HILLIS. Thank you, Mr. Chairman.

I just have a couple of questions, because you have touched on many of the points that I wish to ask you about. It is sometimes argued that the Board of Veterans' Appeals makes errors in judgment and decisions. Assuming this to be a fact, is it not also true that court decisions are sometimes inconsistent and it is only when the Supreme Court has spoken that these decisions are clarified and that, even then, are often decided on narrow points of law, leaving other matters or some matters open to dispute?

Mr. MURPHY. That is absolutely correct, Mr. Hillis. As a matter of fact, I would just mention as an aside on that that the appellate courts basically do not review factual decisions in the trial courts. They review for consistency and precedential law.

Mr. HILLIS. The House passed a bill authorizing an increase in the membership of the Board of Veterans' Appeals. The administration endorsed the bill and, in fact, funds for its implementation are in the VA budget. The other body took an action which ties this increase in Board size to the passage of legislation concerning judicial review.

How do you view the Senate action, and do you believe that these two issues ought to be tied together?

Mr. MURPHY. I view the Senate action, quite frankly, as very unfortunate. I don't believe the two issues should be tied together. They are quite separate issues, although the existence of judicial review obviously directly would impact the Board of Veterans' Appeals.

When, as the Senate has done, they basically replace a House bill with an amendment that consists of an entire Senate bill, they are, in my view, attempting to use procedures of the Congress to hook the merits of one issue to the merits of another issue, hopefully to get it passed. In addition, I would mention that the request of the Veterans' Administration for the expansion of the Board of Veterans' Appeals is on the assumption that there is not judicial review. If there is judicial review, then even with that expansion the Board of Veterans' Appeals backlogs will continue to grow and we will basically have gone back to square one.

Mr. HILLIS. Let me ask you this question: Do you think such matters as rules of evidence, future adversary relationship, the possibility of reversals by courts, will cause rating boards at regional offices or sections of the Board of Veterans' Appeals to be more liberal or more conservative in their decisions? What effect would it have on their decisions?

Miss STARBUCK. It would be my impression, Mr. Hillis, that it would perhaps put a precautionary cloud over their actions, that they would not become more liberal. I think the liberality that is presently displayed in our rating boards is sufficient to the time, but with the understanding that the decision they are making is one which must, in fact, have the ability to stand up in court, or there would be a very cautious approach to that.

Mr. HILLIS. As a corollary to what you're saying, do you believe it would slow down the process and would they have to spend more time on each matter?

Miss STARBUCK. I would be of the opinion that it would, Mr. Hillis, yes.

Mr. MURPHY. Mr. Hillis, if I could just add a comment, when you look at administrative review by the courts, one of the things you very often see is a remand. Since these are reviews on the record, what the remand almost always consists of is sending it back to the agency for further documentation. That process, over time, causes some people who have to be subject to it to become very adept at documentation.

Mr. HILLIS. Do you feel there is any merit to the idea of judicial review on the sole question of service connection of a disability, thus leaving solely to the VA such questions as percentage of disability, permanent and total disability, or unemployability?

Miss STARBUCK. I would see no merit with that narrow finding. In the determination of whether a disability is service connected or not, we must adhere very strictly to the belief that the disability shown today by a veteran does, in fact, relate in a point of time back to a point of active military service. That is really a rather simple decision of relationship to be made.

Mr. HILLIS. Thank you.

That's all the questions I have, Mr. Chairman.

Dr. ROWLAND. Mr. Chairman.

Mr. MONTGOMERY. Yes, Dr. Rowland.

Dr. ROWLAND. May I ask one additional question?

Mr. MONTGOMERY. Surely.

Dr. ROWLAND. I had asked the question earlier about military personnel and the right to appeal in court-martials, and I believe you said in some instances you can and in some instances you can't.

Mr. MURPHY. No. What I meant to say, it would depend—as I understood your question, you were asking about defense issues and the access to the district courts, or at least that's how I understood it.

What my response was is that it really depends on the issues. Some issues are appealable, as I understand it, to the Court of Military Appeals, and some issues are appealable to the Federal U.S. district courts.

Dr. Rowland. I have been given a list of things that precluded judicial review here, and among those I did not find that. Then I was informed that the Supreme Court has held that service members may challenge a conviction after resort to the Court of Military Appeals, and the same is true for almost all other military personnel decisions once they have been presented to the Board for Correction of Military Records. The scope of review is now just like in the bills proposing judicial review for the VA.

So, I interpret this to mean that in almost all instances they do have the prerogative to appeal their cases to the Federal judiciary.

Mr. Murphy. To be honest with you, sir, I don't have enough knowledge of that body of law to really address it.

Dr. Rowland. Well, the reason for my asking this question is, if those people in active military service have the prerogative for Federal appeals, why do not veterans also have that prerogative? That is my question.

Mr. Murphy. I am not here to question the propriety of judicial review in the Department of Defense context. I don't have the knowledge, like I have stated, to do that. But I think you have to look at whether that is beneficial to the group impacted as a whole in the Veterans' Administration. For compensation and claims purposes, I would have to say it would not be. You know, whether court review exists in another discrete context I don't think is particularly helpful to resolving what is more beneficial to veterans.

Dr. Rowland. Assuming that——

Mr. Montgomery. Go ahead. Mr. Penny has been here, but you can go ahead.

Dr. Rowland. Let me yield to Mr. Penny, then.

Mr. Montgomery. OK. Mr. Penny.

Mr. Penny. In some respects I think Mr. Murphy and I are trying to get at the same issue of last resort for veterans who do have an appealable issue. My concern deals with the interpretation of the law. If an interpretation is necessary, the BVA refers that question to you, the General Counsel, and then you give an interpretation of law for that case on appeal, isn't that correct?

Mr. Murphy. That's correct.

Mr. Penny. Would it be fair to say that that then becomes the law of the case?

Mr. Murphy. I believe that's accurate.

Mr. Penny. That would make the counsel for BVA the determiner of the law. How, then, does a veteran proceed if he disputes that interpretation of the law? Is there any recourse?

Mr. Murphy. The recourse is the Congress.

Mr. Penny. Directly to the Congress?

Mr. Murphy. That's right.

Mr. Penny. It is not then one of those instances where a veteran can take it into the court system? There are some limited circumstances where the veteran could take a case beyond the BVA to the courts, but this would not be one of those——

Mr. Murphy. Well, if we're talking of an issue of broad applicability, basically a ruling that will govern or determine a whole class of cases—a number of circuits have clearly held that that's reviewable, as are all constitutional issues.

Mr. PENNY. But if it were argued that this is an interpretation of law applicable only to that particular case, then the veteran would not have that recourse of appeal to the courts?

Mr. MURPHY. I think that——

Mr. PENNY. The veteran, in other words, would have to demonstrate that it had broader applicability than just his own case?

Mr. MURPHY. That's right.

Mr. PENNY. Thank you.

Mr. MONTGOMERY. The Chair would recognize Dr. Rowland again, and then I would like to ask a question or two. Then the Chair will recognize Mr. Daschle.

Dr. ROWLAND. Thank you, Mr. Chairman.

I have difficulty understanding why—and I assume this information I have received is correct—that someone on active military duty would have the right of appeal in the Federal courts, but someone who has completed his active military service does not have that right of appeal. I have a problem in my mind with that concept, if that concept is correct.

Mr. MURPHY. With court-martial?

Dr. ROWLAND. Yes, with a court-martial, why the person who is on active military duty has the prerogative to appeal a court-martial conviction, but a veteran who has completed his military service does not have the right of appeal for a disability claim.

Mr. MURPHY. A court-martial conviction is a criminal proceeding. It can be felonious. We're talking about basically the fundamental distinction between criminal and civil law. A veteran's claim is a claim for benefits. We're not talking about a stigmatation or deprivation of liberty in the constitutional sense.

Dr. ROWLAND. We are talking about, however, the rights of individuals, whether it's criminal or civil.

Mr. MURPHY. We can talk about the rights of individuals separate from the factual context at issue. The rights of individuals for a criminal proceeding leading to possible incarceration are not identical to the rights of individuals, say, in a civil lawsuit involving a car accident. You have to have those in context is my point.

Dr. ROWLAND. I understand that. You see, this is where our perception is different, because you look at it from the perception of an attorney and I look at it from the perception of practicality, a practical matter. I am not an attorney and I don't look at it from that perspective. I look at it from the rights of the individual. We could sit here and go back and forth with this for a long time.

Thank you very much, Mr. Chairman.

Mr. MONTGOMERY. Thank you, Doctor.

Let me ask a question or two and then recognize Mr. Daschle.

Like everyone else on the committee here, I am trying to find the best way to help the veteran on their claims when they are implemented back in the States and regional offices, but I do have some problems with the situation in that we are talking about adding another layer—and I think that was mentioned by one of the veterans' organizations—adding another layer on to the process. I am wondering, if you add another layer by judicial review, why don't we just eliminate the Veterans Board of Appeals and maybe we could speed up the process.

What would be the position of the Veterans' Administration on that?

Mr. Murphy. That's a difficult one for me to address, Mr. Chairman. I will make some general remarks, but I really couldn't sit here and give either the administration, the Veterans' Administration, or a personal view that I would feel comfortable with, without some more hard thinking.

I would say it would be very hard to refute an argument in the future, that if you have judicial review, what is the Board of Veterans' Appeals here for. We are talking about review and finality of decisionmaking.

The courts, whatever else can be said about them, can certainly provide finality of decisionmaking under the existing law. Beyond that, I would be greatly concerned as to our ability to defend the existing organizational elements of the agency in the face of more layers of review.

Mr. Montgomery. Well, of course, if you would eliminate the Board of Appeals, it would, in effect, take the veterans organizations out of helping the veteran, as well as the service officers. I think the veterans organizations would have to address that question.

Mr. Murphy. It would make it much more truly adversarial and a more direct litigative situation.

Mr. Montgomery. It would speed up the process, though, wouldn't it?

Mr. Murphy. Oh, it would make it quick.

Mr. Montgomery. That's another concern that I have about having judicial review, in that it will lengthen the time of processing a claim and even payment of the claim, which I wish we could improve. In the Veterans' Administration we used to be able to say that we could take some action on these claims within a year's time, where the social security system was taking almost 2 years, 2½ years.

What about the time element pertaining to judicial review with what we're doing with claims now and the processing?

Mr. Murphy. It would be difficult to estimate the amount of time that would be added to the resolution of a claim. Of course, it would depend on each case.

I want to mention I know the argument is made that time is an irrelevant consideration because the veteran has already had his claim denied, so he has got nothing to lose in court. I think that overlooks the fact that courts, under virtually anybody's version of judicial review, would have a remand authority. As referred to in some of the testimony, there is a good chance of an extended tennis game between the courts and the agencies. It would add time. How much time is difficult to estimate.

Mr. Montgomery. Mr. Eaton, when you gave us a briefing the other day we asked you this question and you were going to get us some information on it.

Mr. Eaton. Yes, sir; we do have some information about social security now as well as the Board of Veterans' Appeals.[1] You're asking about social security?

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[1] See p. 201.

Mr. **Montgomery**. Well, you can compare them, yes.

Mr. **Eaton**. Yes, sir. Right now, from the time a person first files his notice of disagreement until we reach a final Board of Veterans' Appeals decision, the total appellate processing averages approximately 16 months.

Now, in social security, they do have quite a long waiting period from the time of a request for a hearing before an administrative law judge. The information I have is they do have to wait 185 days. That's 6 months for that process right there. Then, after that, there is a process of appeals counsel. We do not have the exact figures for that, but there is at least another 100 days. Then, after that, there are the various stages in the appellate courts. It depends on how you're adding all that up. This is an apples and oranges situation. But if you add it all up, the overall time I believe is still longer for social security than it is for the Board of Veterans' Appeals.

Unfortunately, we have lost a good deal of our time in the last 4 or 5 years. We have gone up from 10 months to 16 months, so we are rapidly catching up with social security you might say.

Mr. **Montgomery**. Mr. Daschle.

Mr. **Daschle**. Thank you, Mr. Chairman.

Mr. Murphy, you're the General Counsel of the Veterans' Administration?

Mr. **Murphy**. Yes, sir.

Mr. **Daschle**. I assume you're a veteran. When did you serve?

Mr. **Murphy**. I am not a veteran.

Mr. **Daschle**. You're not a veteran?

Mr. **Murphy**. No.

Mr. **Daschle**. You have never served in the military?

Mr. **Murphy**. That's right.

Mr. **Daschle**. And you're the General Counsel of the Veterans' Administration?

Mr. **Murphy**. Yes.

Mr. **Daschle**. Have we ever had a situation whereby we have had a General Counsel who is not a veteran?

Mr. **Murphy**. I don't know.

Mr. **Daschle**. That's incredible.

Mr. **Murphy**. Why?

Mr. **Montgomery**. I don't get the point, either, Mr. Daschle. We have members who serve on this committee that are not veterans. I think Mr. Murphy has been one of our outstanding Government employees. I know you don't mean any reflection on him, but I don't——

Mr. **Daschle**. I would sure hope that the VA, of all organizations, would give veterans preference. I could give you a list of maybe 30 or 40 veterans who would make darned good General Counsels who have served.

The only reason I asked——

Mr. **Montgomery**. Mr. Daschle, we're putting nonveterans in these positions. My veterans' hospital administrator in Mississippi is a nonveteran and he's doing a heck of a fine job.

Mr. **Daschle**. Well, how can we——

Mr. **Montgomery**. I would hate to go back to have to be a veteran now to serve in some of these positions.

Mr. Daschle. Well, I would hope that we practice what we preach. We say veterans' preference is important, and then when we're looking for qualified personnel, whether it's in the VA or whether it's in Congress, that we make it a very high priority to hire veterans.

We have had I don't know how many hearings, untold hearings, about the need to hire veterans. We had the SBA here just grilling them a couple of weeks ago, asking them why they haven't hired more veterans. Now we've got the General Counsel of the Veterans' Administration before us who tells us he has never served.

Miss Starbuck. Mr. Daschle, if I may——

Mr. Daschle. Let me just finish. Let me proceed with the question and then, Dorothy, I would be happy to yield.

Dr. Rowland made an interesting point. It is what led me to ask the question. He said, "Try to assume for the moment you are a veteran, and try then, from a perspective of a veteran, to put yourself in his situation. He justifiedly believes that he has compensation of some kind to be awarded, that he has a legitimate claim for benefits."

Now, he goes to the Veterans' Administration—and in a sense, it is an adversarial position. There is nothing wrong with that. We shouldn't be afraid of the word "adversarial." He's in an adversarial position because the VA is telling him that he is not eligible.

Well, if I were that veteran, I would genuinely believe that it is the Veterans' Administration which is not only putting itself in the position of being a defendant, but also the judge. He is going to the Veterans' Administration seeking some compensation, as he would in a court of law. It is the Veterans' Administration whose jurisdiction here is being challenged. There is no question, it seems to me, that in that kind of a role the Veterans' Administration, which stands to gain by saying "no, you cannot have that," in the sense that they aren't paying out compensation, is also the judge. I think we have to look at it from that perspective as well. It is not just a legal process here. It is a process in which fairness is clearly at stake.

I think, from a veteran's point of view, it is easy to see why they would be very, very concerned about not having that last step. Sure, it's another layer, but that doesn't undermine the opportunity up until that time for the veteran to fully utilize and avail himself of the process that currently exists. But I am troubled by that.

In a brief time if you wish to respond, Dorothy, go ahead.

Miss Starbuck. Well, first of all, Mr. Daschle, I am very sorry that you felt constrained to comment about the General Counsel not being a veteran. I have to tell you that there are many, many people in our regional offices who are making decisions daily with respect to veterans' claims who are not veterans.

Mr. Daschle. Well, that's appalling.

Miss Starbuck. Well, it is not appalling to me because these people in the regional offices are doing a job for veterans that is incomparable. To think that it takes a veteran to make a decent decision is, I think, a fallacy.

Mr. Daschle. It doesn't take a veteran—I'm not arguing that at all. I know there are very qualified people. What we are saying is, when we have veterans who are looking for work, when we know that veterans can do a good job, when we know that they have every reason to believe that there ought to be veterans within the Veterans' Administration who are making these decisions, and then we find there is a sizeable percentage, including the General Counsel, who aren't even veterans, then I think it undermines the VA's credibility and it certainly flies in the face of everything that we say on the Veterans' Affairs Committee with regard to the need for veterans' preference.

Miss STARBUCK. That is a perception that I think is not widely shared.

Mr. DASCHLE. I disagree strongly.

Mr. MURPHY. Let me address what I think may have been a question in all that.

You postulate a veteran coming to the VA and you have difficulty that he comes to the VA because we're set up as judge. I would have to ask you in return, where do you want him to go, to another agency?

Mr. DASCHLE. I want him to go to the courts. If they can't resolve it——

Mr. MURPHY. In the first instance?

Mr. DASCHLE. If you'll let me answer, Mr. Murphy, no; not in the first instance. I just said I think he needs to go through the process. Obviously, if they can work it out, as they do, between a plaintiff and defendant initially, if you can work it out outside of court and resolve your differences, so be it. Do that and use the process. But, if it can be shown—and a veteran knows in many cases. Obviously if he doesn't know and he elects to use the full process, that ought to be his right.

I would only add one more point, that we go in the military system beyond simply criminal procedures. I am told that disability compensation programs for decades have been used by high-ranking officers and high-ranking enlisted people. They have that access. We can document case after case, hundreds of cases, within the active military system whereby these officers and high-ranking enlisted people have gone to the court system, and I think you know that. So we have created a double standard: An opportunity for a military officer to use a court of law, but then, as soon as he retires to prohibit that access, I think that is really a questionable practice. I would hope the Federal Government could resolve that in favor of the veteran.

Mr. LUKEY. Mr. Daschle, we have some data here about the number of military cases filed in the Court of Claims. There really seems to be a very small number of these cases and that's why we haven't done a great study. We have made our comparison over the years with the social security disability system, which we still maintain is the most comparable system to our own.

There are now 208 military pay cases pending before the Court of Claims, a relatively small number, of which only a relative few, without a number, unfortunately, involve disability issues and the retirement system——

Mr. DASCHLE. Mr. Lukey, that's not the point. It doesn't make any difference whether it's 1 or 500. The fact is it's being done and the precedent is there. The opportunity to avail yourself of a court of law is there. You can't deny that, once having established that precedent, it is hard to turn around and say, "Well, that precedent isn't there for a veteran" who simply has retired. That's the point, I think.

Mr. MURPHY. No; the point we're trying to make, Mr. Daschle, is that a precedent in another area is a precedent for that area and not necessarily this one. Your argument would extend all existing laws to everything, regardless of their propriety.

Mr. EDWARDS [presiding]. The time of the gentleman has expired. Mr. Sundquist.

Mr. SUNDQUIST. Thank you, Mr. Chairman. I had a couple of points I wanted to make, and then I wanted to ask Mr. Daschle a question.

I think the problem that I face in listening to alternatives to the present system is that the claims are taking too long to process, that the VA ought to do everything they can to get back to the 10 months, and perhaps the pressure won't be there then, as opposed to accepting it. I would vote for additional money to speed this process up, but I think it takes a goal of doing it within the VA to get it done. I think, with the computers and everything, there are ways of doing it.

It appears to me by my experience that veterans are discouraged from reopening their claims, and I think that's a problem. But—I wanted to make sure Mr. Daschle was here when I made a comment, but I guess he's leaving. But I would suggest to you that that would be the appropriate movement within the Veterans' Administration.

I wish Mr. Daschle was here because I wanted to bring up the point that all members of this committee are not veterans, so how can we be critical of the General Counsel of the Veterans' Administration. As a matter of fact, just today I talked about the need for giving veterans' benefits back in TVA and some National Parks perhaps where we're not doing that. I don't think it is a fair criticism of you, Mr. Murphy, and I want you to know that at least I don't share Mr. Daschle's feeling that you should be disqualified when, in fact, members of this committee have not been disqualified from serving on this committee simply because—and I'm a veteran—simply because some of us are not veterans. I think we have had a chairman of this committee who has not been a veteran in the past. So I think that is an unfair criticism of you and I would like to make that point.

Thank you.

Mr. MURPHY. Thank you, Mr. Sundquist.

Mr. EDWARDS. The gentleman from Texas, Mr. Hall.

Mr. HALL. I have no questions at this time, Mr. Chairman.

Mr. EDWARDS. Counsel.

Mr. SHULTZ. Mr. Murphy, I have just one question.

Don't complex cases such as those involving agent orange, radiation, and/or post traumatic stress really justify judicial resolution?

Mr. MURPHY. No; as a matter of fact, I would think they may be some of the most poorly suited cases for judicial resolution. The issues in matters such as agent orange is an extremely complex medical issue, of which a court would resolve in a trial—which wouldn't occur under this judicial review—by the presentation of one or two, three or four, however many, but the point being an extremely limited number of medical expert witnesses that may or may not, depending almost on the ability of one litigant or the other to acquire resources reflect accurate medical and scientific information.

The problem the VA is addressing, and the Congress and the country is addressing in agent orange is literally nationwide. Is there a relationship between exposure to a phenoxy herbicide and a given disability? A ruling by a court on specific facts, particularly on a documentary record, would not only not be beneficial in resolving that issue, but it could be very damaging.

Mr. **Edwards**. We thank Mr. Murphy and his colleagues for their very helpful testimony.

Mr. **Murphy**. Thank you.

Mr. **Edwards**. Our next witness is Loren A. Smith, who is Chairman of the Administrative Conference of the United States. Mr. Smith is accompanied by Richard K. Berg, General Counsel.

STATEMENT OF LOREN A. SMITH, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY RICHARD K. BERG, GENERAL COUNSEL

Mr. **Smith**. Mr. Chairman, thank you very much for this opportunity to appear before the Veterans' Affairs Committee. Let me introduce, as you noted, the General Counsel of the Administrative Conference, Richard Berg, sitting to my left.

The Administrative Conference is a small, independent Federal agency whose mission is to help make the administrative process more fair and more efficient. We are really not substantive experts on the workings of Federal agencies. Our expertise is in procedure.

This matter was considered by the Administrative Conference, which is made up of 91 members. Fifty of those members represent various Government agencies, including the Veterans' Administration, and 40 members of the Administrative Conference are chosen from the public, including law professors and members of public interest groups, business attorneys and practitioners of administrative law. The Chairman is the only full-time member of the Conference and I am appointed by the President.

The Conference, 5 years ago, before I was Chairman considered this matter. I must say I come here with a note of frustration or fear that my lack of anything definitive to say will produce some frustration in the committee for having asked the Conference to come here. The Conference proposed a recommendation that went through its committee process, urging that judicial review be granted in veterans appeals cases. The Conference debated this issue in December 1978 and rejected that recommendation by tabling it. So the Administrative Conference took no stand on the issue and I must say, as the Chairman of the Conference, any comments I make are made personally.

I would also note that I have reviewed the proposed recommendation and the transcript of the debate that the Conference held, and from that material it seemed to me that there was a fundamental split on the part of the members of the Conference with a consensus being that there was really no problem that needed solution, or at least there was no problem needing solution that had been clearly presented to the Administrative Conference.

On the other side of the Conference, the minority view was that really there were no strong facts to justify a major problem needing a solution, but that the presumption and burden of proof should be in favor of judicial review, and there also having been submitted no evidence that judicial review would create major obstacles to the administration of veterans programs by the Veterans' Administration, that judicial review should be the norm and should be adopted.

Just to summarize my remarks, let me note that there seem to be four reasons that have been suggested against judicial review that came up as a result of the debate before the Administrative Conference, and three that seemed to favor judicial review.

On the "con" side, there was the view that there was no problem and this was a solution in search of a problem; second was the comment that judicial review would formalize veterans' decisions and this would be adverse to the effective working of the system and would produce the kind of delays that are seen as a problem; third, that this would be a cost that would be imposed upon the system, since judicial time is not a free good, and that there would be no consequent benefit to the veterans of adding judicial review; and fourth was the comment that when you transfer decisionmaking from an administrative agency that presumably has the expertise to a generalist court, where the expertise is not in matters relating to any specific subject matter but in procedure, you're really losing the benefits that agencies like the Veterans' Administration were established to provide.

On the "pro" side was, first, the general principle that judicial review was an important part of our system; second, that in individual cases there is always potential for abuse and faulty decisionmaking, and judicial review provides one kind of corrective; and third, there were factual mistakes and specific concerns that prompted certain individuals to support judicial review in the Veterans' Administration, that no system is perfect, and that the corrective of judicial review is necessary.

Let me make two other comments with respect to the debate on this particular issue.

There seemed to be a fairly broad consensus that if judicial review were adopted, the scope of review should be relatively narrow, and there was also on record, second, the position of the Administrative Conference that specialized courts of review are not generally useful to the administrative process.

Mr. Chairman, I would ask that my formal statement be made a part of the record, and if we can answer any questions, we would be happy to.

[The statement of Mr. Smith appears at p. 202.]

Mr. EDWARDS. Thank you, Mr. Smith.

Mr. Berg, do you have a statement?

Mr. BERG. No, sir.

Mr. EDWARDS. Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman.

Mr. Smith, I notice, as you indicated, there were really no definitive positions that were taken by the statement you have presented. Maybe Mr. Berg should be the one I should direct this to.

After you have practiced law for a long period of time, as I have, before coming to Congress, of course, you are tuned in to people having the right to go into court to settle their claims. As has been mentioned to me this morning, maybe the underlying problem to consider is whether or not substantial justice is being done now with the veterans, not being in an adversarial capacity with the Veterans' Administration.

Second, if you do have judicial review, you will automatically have an adversarial relationship probably between the veteran and the Veterans' Administration—the burden of proof and the like.

But you mentioned in the statement about the Federal Employees Compensation Act where we have a nonreviewability provision applicable to that particular area. Maybe that fits that situation, maybe it doesn't. I'm not one to make that decision. But during the past 7½ years that I have been on this committee, and in the correspondence that I have received from my district—that's what I'm primarily concerned with—I have had many situations arise where a veteran feels like he or she is just entitled as a matter of right to have their claims adjudicated by a court. Some feel that the timespan in the Veterans' Administration is exceedingly long. Of course, having some knowledge of the court system, I realize it may be a longer procedure if it gets into the courts. There has been some questions submitted that it may inundate the court with a lot of cases, case filings, which I have some question about.

But what is the basic reason, if you have one, as to why a veteran should not have the capability of having his case reviewed by a court, maybe based on the substantial evidence rule, or whether or not the evidence was or was not clear and convincing before the Veterans' Affairs Committee. I would like to have your comments on that.

Mr. **Berg**. The Conference wound up without a formal conclusion for or against judicial review. Essentially we tabled the recommendation. One can only state the conclusion tentatively.

I believe the Conference felt, the majority who were voting, felt that basically the courts were not going to be able to effectively second-guess this kind of conclusion, that there would be a burden both on the judicial system and possibly on the administrative system in the sense that the possibility of judicial review would tend to formalize the agency process below.

I think the Conference simply felt, particularly since it was demonstrated that there were analogues in other administrative systems, that is, employees compensation, that the situation wasn't unique and that a showing had not been made that judicial review, all in all, would improve the total results of the system.

I don't want to state this too strongly, because the parliamentary situation was that the Conference declined to make a recommendation. As you gentlemen I am sure are aware, when a body decides not to do something, there can be a range of reasons for the decision not to act.

Mr. **Smith**. Mr. Hall, I wonder if I may add to that.

Really, the decision of the Conference was that it wasn't our decision to make; it was a policy matter and the expertise lies within this committee, within the Senate committee, within the Veterans' Administration. But the Administrative Conference has no procedural answer as to whether you should or shouldn't make this decision.

Mr. HALL. Thank you.

Mr. EDWARDS. Mr. Daschle.

Mr. DASCHLE. Thank you, Mr. Chairman.

I guess I would like to follow up on some of the questions I was asking the earlier witnesses with regard to precedent. Is it your understanding as well that there is a precedent currently accepted as practice within the active duty ranks of Armed Forces personnel today in regard to certain compensation claims, that there have been instances whereby military personnel have availed themselves of the courts?

Mr. SMITH. Congressman Daschle, I have no real expertise in that. The only statement I could make is that judicial review is obviously the rule in the administrative process.

Mr. DASCHLE. Is the rule in the administrative process?

Mr. SMITH. The cases of an absolute bar on judicial review tend to be the exception.

Mr. DASCHLE. From the perspective of continuity and the same kind of predictability with regard to any Federal agency, would it not be your view that having consistency throughout the Federal Government would be necessarily a good thing?

Mr. SMITH. As to the general question, I think there is always a presumption—I guess that's the very nature of law, to make it most consistent. The extent to which you have any inconsistency has to be, I think, justified by special circumstances.

Mr. DASCHLE. What do you think the special circumstances are as we try to distinguish between active duty personnel and retired active duty personnel?

Mr. SMITH. Well, again, this is off the top of my head because we have no expertise on the substantive matter. But I would look, if I were trying to make this decision, at the kinds of cases and the substance of the cases that are involved in the active duty situation and compare those types of cases to the cases that the Veterans' Administration decides.

Mr. DASCHLE. Let me just hypothesize for a second—and you'll have to bear with me. But given the fact that we would have a similar situation—let's assume for a moment that you have a disability claim situation within the active duty ranks. It then goes through the process and into the courts. You have a similar disability claims process through the Veterans' Administration and it stops there.

Would it be your view that similar disability compensation claims ought to be treated similarly within the Federal Government?

Mr. SMITH. I think that's a correct proposition, that if you see one type of case that is virtually identical to another being adjudicated under different rules, that obviously creates problems and creates a perception of unfairness.

Mr. **Daschle**. So what you're saying, the bottom line is that the adjudication process ought to be similar for similar kinds of claims, regardless of where they fall within the Federal Government?

Mr. **Smith**. Yes, I think that's true, unless there are other intervening factors. I think the burden on treating similar things differently is on the argument for treating them differently.

Mr. **Daschle**. I think that's all we're saying. I think those who may argue that that isn't what is happening today have some justification in saying virtually what you have just said, that indeed we are treating those in active duty ranks differently in some cases than we are those who were active duty and are now retired. So I appreciate the benefit of your thinking on this.

That's all the questions I have, Mr. Chairman.

Mr. **Edwards**. Mr. Smith, you said that your last review of judicial review for veterans was 5 years ago and you had attacked the problem at that time from the wrong end. Is the Conference planning to conduct another study in the near future on this issue?

Mr. **Smith**. We have no current plans to conduct a study. In part, I guess, we would be looking for the kind of—if there was something useful on the matter we could do, we would do it. But I think, from a reading of the transcript of the debate, the problem we had was the issue tended to be more substantive than procedural. Our expertise is in procedure and from the procedural point of view it was difficult to determine whether there was a need for judicial review or not. Largely, that hinged on the expertise of this committee and the VA as to whether, in fact, there was a substantive problem. We really don't have the expertise to determine that.

Mr. **Edwards**. Thank you.

Counsel.

Mr. **Shultz**. No questions, Mr. Chairman.

Mr. **Edwards**. Thank you very much, Mr. Smith and Mr. Berg.

Mr. **Smith**. Thank you, Mr. Chairman, for giving us the opportunity to be before this committee. I think the Conference is best when it is able to serve the Congress and provide useful guidance, and I hope we have provided some light, even though we came out with a nonposition at our 1978 session.

Mr. **Edwards**. Our next witness is Mr. Frederick Davis, dean of the University of Dayton School of Law. Mr. Davis appears on behalf of the American Bar Association.

STATEMENT OF FREDERICK DAVIS, DEAN, UNIVERSITY OF DAYTON SCHOOL OF LAW, APPEARING ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. **Davis**. Thank you, Mr. Chairman. It is both an honor and a pleasure to be able to testify here today with respect to this problem, a problem on which the American Bar Association has taken a very strong position.

I would like to say at this point that I have no personal axe to grind, and neither does the American Bar Association, with respect to these legislative proposals. There is no large group of lawyers hungering to represent veterans and make a lot of money. The section of administrative law, which is behind the resolution which would urge that decisions of the VA be subject to some limited judicial review, has taken that position largely because of its concern with the constitutional integrity of our Government. Just basic fairness is what we're concerned about.

Now, the law says, as you know, that decisions of the Veterans' Administration with respect to any benefit are not reviewable in any court, by mandamus or otherwise, and the courts have pretty much given that provision of the law a literal interpretation. They have gone so far as to say that even arbitrary and capricious decisions of the Veterans' Administration are not subject to judicial correction. There is no other situation that I know of, except for the Federal Workmen's Compensation System, in which we have a department of Government totally insulated from any external audit as to the accuracy or propriety of its decisions.

It is not a question, as the General Counsel of the Veterans' Administration was wont to put it, of our wanting to have a system in which you have appeal after appeal so you ultimately refine with exquisite care a certain decision. I think what the American Bar Association wants and what the people who are testifying here in favor of judicial review want, is some modest and nonintrusive external check on the legality of what the Veterans' Administration is doing.

My interest in this matter originally was quite academic. I was amazed that such statutes existed and I began to get concerned about it. But that interest became very real when I was teaching at the University of South Dakota. We had a veteran who came there and he knew that his veterans' benefits under the statute needed vesting—that he had to begin his education by August 1—and that if he didn't begin his education by August 1, his benefits would lapse. So he came down to register for summer school, beginning on July 1, realizing that that was the way he had to do it to entrench his benefits.

The adviser at the University of South Dakota, Mr. Lowell Hansen—I will always remember his name—said, "Well, maybe we can do something about this." He was not a lawyer. He called up the VA Regional Office in Minneapolis and told them what the situation was, and the Administrator in Minneapolis says, "We will waive that. Tell him, if it's inconvenient for him to go to summer school, tell him he can come back in September and we'll waive that." So Lowell Hansen told this man, Mr. Steinmasel that it was perfectly all right with the VA and that he didn't have to enter school at this time. Well, that became the case of Steinmasel against the United States.

Now, the evidence—and you'll have to take my word for this—the evidence in the case was Lowell Hansen's testimony as to what took place, the fact that Mr. Steinmasel, who was prepared to enter the University of South Dakota, turned around and didn't enter on the basis of the representations made, and the testimony of the Veterans' Administration official who said he couldn't remember giving that advice. The Board of Veterans' Appeals turned down the case, saying there was no evidence to support the claim that Mr. Steinmasel made.

Now, those of you who are lawyers perhaps can understand the frustration of having a tribunal say something like "Fred Davis, that's not your name; your name is Pepperbretsky; or you're not really here, you're in San Francisco, and that's final." Of course, absurd things like that don't happen, but a number of things happen which come very close to that. And contrary to what Mr. Smith said, when the Administrative Conference considered this proposal back in December 1978, there were a number of documentations of situations in which the VA had acted arbitrarily.

For example, the widow of a serviceman, acknowledged by the military to have been killed in the line of duty, applies for VA benefits. The VA says he was not killed in the line of duty. Of course, that is not unusual to have two different agencies interpret a statutory term differently for different purposes. That happens in other areas of the law. But isn't that the situation in which the individual aggrieved feels like he ought to have some sort of judicial look at that? Basically, that is all that the various proposals that are before Congress do. They simply ask that the veteran be permitted to petition a court to take a look at what he thinks to be an arbitrary, capricious, or totally unjustified exercise of authority by the Veterans' Administration.

There were many other examples before the Administrative Conference. For instance, there were a number of cases in which veterans have been convicted of criminal offenses that disqualify them or their widows for benefits, and on appeal, the conviction is reversed, and yet the veterans benefits are not reinstated. We have cases from an earlier period in which veterans made speeches which were unpopular, and the benefits were withdrawn with no judicial review. We have plenty of examples of situations in which the VA has acted arbitrary and capriciously.

But even if we didn't have them, the fact that they have the power to do that, without having to answer to anybody at any time, I think is totally inconsistent with constitutional principles; against what we were taught in school; and in defiance of commonly accepted expectations.

One of the things that they say will happen if you open the VA up to judicial review is that you will have a flood of claims. In my written testimony I think you will see the arguments that indicate we will not have the flood of claims that are predicted. All that the legislation would really do would be to permit a veteran to petition the court to review—and the courts are not hungry for jurisdiction these days—and it would be only the most egregious departure from congressional expectations that I think would win judicial review. It is not the same as social security because the proposals before the Congress would not use what is called the substantial evidence test. So the decisions would be reversed only if there was a clear showing that they were arbitrary or capricious or an abuse of discretion, which is a much narrower test than the substantial evidence test.

There are also some predictions that this would create chaos within the Veterans' Administration, that it would undo their already refined and reliable procedures. That is simply not true. Merely opening up a very modest amount of jurisdiction to the courts to take a look at what appears to be egregious departures from congressional policy would not upset the internal procedures of the Veterans' Administration one iota.

I have already mentioned that there has been a lot of talk about attorneys hungrily waiting for this legislation so they can make a lot of money representing veterans. I don't know of any attorneys that have ever done that or even think about doing that. In the course of my time as both teacher and practitioner, I have encountered a number of lawyers who have represented veterans, and they have discovered the statute and have been absolutely appalled by the fact that not only is there no judicial review, but that they can't charge more than $10 for their representation, and if they do, they are subject to being sent to jail for 10 years. These are two situations which I think are just incredible.

I am very happy to be here to talk about some of these problems today. I am pleased to have been asked to come here, and I would be happy to answer any questions.

I have noticed that the questions of previous witnesses have elucidated a lot more information than just statements made by witnesses, so I hope you will put some questions to me and I will do my best to answer them.

[The statement of Mr. Davis appears at p. 212.]

Mr. Edwards. Thank you very much, Dean Davis. That is really very helpful testimony and we thank you for reminding the committee that there are in the record you referred to of the Administrative Conference the examples of where justice has gone awry.

It occurred to me while you were testifying that the toughest criminal in Folsom Prison can get judicial review of some sort, by filing a writ of habeas corpus, and yet the veteran can't, no matter how arbitrary the decision of the Veterans' Administration might be. It doesn't quite make sense to me and I don't think it makes sense to you.

I have no further questions, except to thank you for your splendid testimony. I will yield to the gentleman from Texas, Mr. Hall.

Mr. Hall. Thank you, Mr. Chairman. Thank you, Mr. Davis.

Pursuing further the question I asked the previous witness, as we all know, at the present time in reviewing a claim, the veterans can consider self-serving declarations, hearsay testimony, to try to establish the validity of a claim. You can come back and refile if you don't think you have had a sufficiently good hearing, that if you have lost your case you can come back and, if you can show additional evidence, usually medical evidence, you can start all over again and just keep going on and on and on.

If a law was on the books based on having the court make a decision to uphold the findings based on substantial evidence, or whether or not it was arbitrary and capricious, or the people abused their discretion, do you feel the Veterans' Administration, anticipating a court review, might limit the kind of testimony it would receive at these hearings, doing away with hearsay statements, self-serving declarations, the type of testimony that they now take under consideration, because a court may say "you have abused your discretion and taken into consideration all of this testimony that is not admissible in a court of record."

Mr. Davis. I don't know what the Veterans' Administration would do, Congressman Hall, but I know there would be no reason for them to do that. It is very common, in any administrative action, to accept testimony and evidence which is not prohibited by the normal rules of evidence applicable in court cases. That has been the law for a long time, even in agencies which are subject to more exquisite judicial review than the VA would be. So there would be no reason to fear that the sources of information upon which they are going to rely would be in any way limited.

Mr. HALL. Well, do you have an opinion as to whether or not, if a law is passed giving judicial review, that that judicial review should be based on the substantial evidence rule, or whether or not arbitrary and capricious decisions may have been made by the administrative agency?

Mr. DAVIS. My personal opinion, Congressman, is that the formulas that have been used for the various proposals before the Congress, which do not use the substantial evidence test, are the correct ones, because they would tend to lessen the likelihood of what you might call judicial second-guessing. Words are words——

Mr. HALL. I may be wrong on this, but don't the social security cases, when they go to court, aren't those cases based on substantial evidence?

Mr. DAVIS. Yes, they are. The decision of the social security agency in connection with old age and survivors insurance claims or disability claims is reviewable to determine whether it is supported by substantial evidence in light of the whole record.

Mr. HALL. Why should it be different in a case like this?

Mr. DAVIS. One reason is there have been many persons such as myself who have been moved to question the utility of that test in social security cases. Where the claims were just for survival and old age insurance, old age and survivor benefits, you didn't have very close questions of judgment and fact, so the substantial evidence test was all right when it only applied to those claims. But when we brought the disability claims into the system, applying that test to every disability case has created too many cases in the courts, because the courts are required to review those decisions to see if they are supported by substantial evidence in light of the whole record.

I happen to think there are too many cases challenging SSA decisions, and that's why I think the forumula used for the Veterans' Administration cases would be better. I think it would permit the court to reverse a case which was clearly an abuse of agency discretion, but not involve the court in other cases in which there might be some differences as to the substantiality of the evidence in light of the whole record.

Mr. HALL. Did I understand you to state a moment ago that you were familiar with a case or cases where a veteran had made a speech of some kind and lost his veterans' benefits?

Mr. DAVIS. Yes. *Thompson* v. *Gleason,* which was in the court of appeals, is one such case. The other case is *Wellman* v. *Whittier.* Now, in those cases, Congressman, the veterans were successful in going to the courts because those cases were decided before 1970. I wrote my Law Review article on this subject in 1964. The Court of Appeals for the District of Columbia picked up on the notions that I had established in that Law Review article and opened up appeals, from VA decisions withdrawing benefits, so Wellman and Thompson were able to overcome those adverse decisions of the VA.

In 1970—I think as a great compliment to me, in a way—the Veterans' Administration attached as a rider to the appropriations bill that went through Congress at that time—an amendment to the statute which plugged every possible hole that I had indicated was available in my 1964 Law Review article. Thus, today, under the present statutory language, Thompson and Wellman would not be able to get judicial review of those decisions of the VA, cutting off their benefits on the basis of speeches they had made.

Mr. HALL. Thank you.

I yield back.

Mr. DAVIS. I might add that I think you should all know that I was the reporter for the Administrative Conference of the United States which made the recommendation for judicial review, and I would like to report that the recommendation was unanimously approved by the committee structure of the Administrative Conference all the way up to the top. It was defeated at the plenary session in December 1978, for a number of reasons—and if I may, I would like to list a couple of the reasons.

There was a sort of elitist attitude prevailing. It wasn't a full plenary session and there was a prevailing attitude that these little claims weren't really very important. The session was more concerned about big environmental issues and so forth. One of the leading opponents of the proposal was the late Justice Harold Leventhal, a very good friend of mine. But he was very much opposed to this because the Judicial Conference had taken a position against expanding the jurisdiction of the Federal courts. He had an ideological stake in the matter because it conflicted with a resolution of the Judicial Conference.

Now, I can sympathize with the position taken by the Judicial Conference. I am an academic and if there's one thing I don't want it is a lot more blue books. The fewer blue books I have to grade, the happier I am. But you have to take some of those. We are always looking for ways to cut down on the student-faculty ratio and I can understand why Judge Leventhal would feel the way that he did. But on principle, there was absolutely no reason why our proposal should have been defeated. I think the politics of the situation were that Judge Leventhal was very influential and that he also got Prof. Kenneth Culp Davis on his side. I also think that Prof. Kenneth Davis felt that he had not been sufficiently consulted on the issue. So there was some politics behind that rejection. The transcript of that Conference, if you read it, clearly supports these reviews.

Mr. EDWARDS. Thank you, Mr. Davis.

Mr. Evans.

Mr. EVANS. Thank you, Mr. Chairman.

I also appreciate your testimony, particularly in light of the fact that we have had two administration lawyers appear to be afraid of other lawyers, or afraid of courts being involved in these matters. I want to clear up something if I can.

One, I think there is a misperception among many nonattorneys, perhaps even on this committee, that the introduction of lawyers, even at the administrative level, to the Board of Veterans' Appeals is going to add an adversarial type of flavor to the proceedings. In fact, I know from my limited administrative hearing experience that quite often the lawyer serves as a mediator, that he is not quite the courtroom litigator that a person in regular court is.

I would like to have your comment on that notion.

Mr. DAVIS. Well, I think the point is well taken, that a lawyer can serve his client in many other ways as a participant in the adversary process. As the social security cases indicate, in many of those instances, if the claimant had consulted an attorney early on, the case would not have gotten to the point at which it caused a lot of trouble for both the claimant and the Government.

That is something the American Bar Association also believes, that denying veterans the opportunity—and all we want is the opportunity to consult counsel—denying the veteran the opportunity to consult counsel means that he doesn't get the best advice and he doesn't get the advantage of what might be an ameliorating influence or a negotiated settlement of the case at that early stage. I think the point is very well taken, indeed.

Incidentally, as the dean of a law school—and I have only been dean for 2 years—I fully expected to be sued. Almost everybody appears to get sued, and I was kind of looking forward to it. I'm not afraid of going to court. I think we all have to go to court sometimes. It is the prerogative of any American citizen, if he believes himself aggrieved, to sue somebody else. So I fully expect to get sued. I'm not really concerned about it. I haven't been sued yet, but I'm not really staying up nights worrying about it, either.

Mr. EVANS. To take that point one step——

Mr. HALL. Once you get sued for a million dollars, you'll be concerned about it. [Laughter.]

Mr. DAVIS. Well, my wife might be, I suppose. I guess I would be a little bit concerned.

Mr. EVANS. To take it just one point further, too, a lawyer involved in the administrative process may know when not to sue. After hearing the issues before the administrative procedure, there may not be much of a record to actually pursue judicial review, and a lawyer involved could prevent a lot of the court cases.

Mr. DAVIS. I think that is probably true. If the lawyer is involved in it at an early stage, certainly the record will be more complete and there would be a better opportunity to determine whether there was, in fact, a departure from congressionally mandated principles in the implementation of the benefits program.

There is a lot of talk about the usurpation of the congressional expectations by the courts. Actually, all that judicial review would do would be to prevent what I would call a bureaucratic usurpation. If the Veterans' Administration doesn't have to answer to anybody as to how they distribute these benefits, they tend to make up their own law. That law that they make up may not be consistent with what Congress has said.

We have many instances of that. There was a program of educational benefits that the Congress enacted in 1977 which was available to everybody. It was a 9-month extension program. It was available to everybody. The VA took the position that it was available only to veterans who had already begun their educational programs. There was nothing in the statute which authorized that interpretation. It may have been a good one; it may have been a wise one; but the statute didn't authorize it. There was no judicial review of those decisions denying those educational benefits to veterans who had not already begun to be covered in the program. Those are all in the report I made to the Administrative Conference in 1978, all those examples.

Mr. EVANS. Thank you.

Mr. EDWARDS. Mr. Daschle.

Mr. DASCHLE. Thank you, Mr. Chairman.

Dean Davis, welcome. I am glad you're here.

Mr. DAVIS. Thank you.

Mr. DASCHLE. I appreciated many of the comments you made.

Let me just address some of the arguments made this morning as to the reasons given why we shouldn't have judicial review, and I would like to have you address them. One was made earlier today by the VA—and I will quote from their statement on page 2. It says, "It is our experience that VA employees try to find a way to grant a benefit and that many claims are allowed by the VA that would be denied under a more adversarial process." This goes a little bit to what Mr. Hall was asking.

Would you address that?

Mr. DAVIS. Well, they have said that many times, and when they say that, the implication is that if you have judicial review, somehow or other the administration of the program will not be as beneficial or as generous, that it will somehow destroy equities.

I see no reason for their taking that position. For example, if they grant benefits in a questionable case, who would have standing to challenge that? I don't know of any principle which would allow a taxpayer to come in and challenge it. There is nobody aggrieved except possibly the taxpayer or the Attorney General. It is not likely that either would bring an action challenging a course of decisions made by the Veterans' Administration.

But the flip side of that is something that has always worried me. We don't know because it's a closed system. We don't know because we don't get judicial review. But there are intimations, at least to me, that there may be selective preferences extended to certain people in the administration of that claims program. Selective enforcement of the law is one of the worst problems that we face in a constitutional democracy. Selective preferences in a benefits program is also a terrible thing. It is just possible—we don't have any evidence to document this—but it is at least possible that the Veterans' Administration may selectively prefer certain types of persons. We do have some evidence that, depending upon the quality of the disqualifying criminal offense, they do make some arbitrary distinctions.

Mr. DASCHLE. Let me ask you a related question. They say on page 4 that "The enactment of judicial review would interject an adversary relationship into what has been a cooperative process and that, as a matter of principle, the VA should never be placed in an adversary position, much less become an opposing litigant, with respect to any claimant."

Are they addressing a legal principle here? What do you think they might be referring to when they say "as a matter of principle the VA should never be placed in an adversary position"?

Mr. DAVIS. I heard your questions this morning. I think you brought that point out quite well. It is not adversary until they say no. In establishing a claim before the Veterans' Administration judicial procedures are not applied, so you don't feel like you're before a court of law. You bring in your records and so forth and they are reviewed by a committee and what have you. But that is true in any claims administration situation. It only becomes adversary when the claim is denied, and when the claim is denied and the person believes it is unjustly denied, that is when you need something in the nature of a judicial proceeding in order to determine the issue.

Mr. DASCHLE. In your study of the process in other agencies of Government, obviously there is ample experience to find what costs were incurred by claimants seeking some compensation. One of the final arguments within the VA testimony was that the present availability of free expert assistance which flows from the preservation of virtually their entire award of benefits far outweigh the theoretical advantages of attorney assistance at sometimes very high cost.

Do we see that to be true as we look to other situations? From the experience you have seen, could you comment on what costs are incurred on an average basis?

Mr. DAVIS. Well, I can't give you an actual cost figure, but there are situations in which attorneys have represented claimants on a pro bono basis. As a matter of fact, two of the persons that have been the most active in support of opening up the VA to judicial review are members of a pro bono organization associated with the American University School of Law.

Mr. DASCHLE. What you are saying is there are cases where the American Bar Association and lawyers, just on a very ad hoc basis, provide legal assistance free, a gratis.

Mr. DAVIS. That's right.

Mr. DASCHLE. So in those cases, then, what you're telling us is that claimants would not incur any kind of liability or cost?

Mr. DAVIS. I think so, in those classes of cases. But the problem is that pro bono work is not always available across the board and there may be veterans who would not have access to that and they would have to pay for legal services.

Mr. DASCHLE. That would obviously weigh in their decision as to whether they wanted to pursue their option under judicial review.

Mr. DAVIS. I think it would, yes. As I pointed out in my written testimony, the types of cases that have produced concern have not been quite the same as you have in the social security disability area. Most of the cases deal with disability ratings, so it is not an "all or nothing" thing and it is not likely that very many veterans would be wanting to pursue that issue all the way up through judicial levels. But I think they should have the opportunity if they want to do it, and if they feel they are the victim of a particularly obnoxious or illegal decision, to have a chance to have somebody else look at it.

When you get right down to it, that is the kernel of the whole thing. It is not so much that the Board of Veterans' Appeals is not accurate, or that their decisions are not efficient. It is the fact that it's within the Veterans' Administration that that decision is made, and it is perceived by the veteran as having been made within the Veterans' Administration. We have all been told that every person has an opportunity to have a decision of an offending Government official looked at by an external group, which we call the courts, who have no psychological stake in what's going on.

Like it or not, the members of the Board of Veterans' Appeals have a psychological stake in keeping their records clean with respect to the VA. Don't forget, those persons are appointed within the VA. They are not like your administrative law judges. They are purely institutional appointees. I am not saying that makes their decisions bad, but at least we don't have the guarantee of integrity and perspective that you at least have with your administrative law judge in a normal administrative agency.

Mr. **Daschle**. Mr. Chairman, I know my time is up, but the last statement I think is really it. It is the nub of the whole argument, that we are putting the VA in the position of being both the defendant and the judge——

Mr. **Davis**. That's exactly right.

Mr. **Daschle**. Dean Davis, thank you. We are just sorry to have lost you from South Dakota.

Mr. **Davis**. Both of my sons were born there.

Mr. **Daschle**. Thank you.

Mr. **Edwards**. Mr. Wilson.

Mr. **Wilson**. Mr. Davis, there is obviously a cost factor attached to judicial review. It is by no means the overriding factor, but would you discuss that briefly, please?

Mr. **Davis**. Well, in my written testimony I addressed the question as to what is likely to happen. Now, there are some dire predictions of a tremendous increase in cases and a cost factor very high. An Assistant Attorney General came up with a prediction of something like a 10-percent increase in caseload.

I just don't see that, and I list the reasons why I don't see that actually happening. I don't think the social security system was a good analogy upon which to draw and make those projections. So I really can't pull cost figures out of my coat pocket here. But I don't think the cost would be great, and I think whatever it is, it is worth it to have the confidence and integrity of the various people who deal with the Veterans' Administration restored and maintained.

You will probably hear some testimony from some people who have been through this, and the feeling is one of just great indignation when they find out they cannot go any place to have that decision, which they think is terribly unfair and arbitrary, corrected.

We have one case in which the claim was for injury to the upper back. They made a decision of "We have examined your lower back and there is nothing wrong with your lower back." He said, "It's not my lower back; it's my upper back." No judicial review. You can imagine the feeling of frustration that individual felt. It is not good for our society that people have that feeling that they've been done in by a bureaucracy. At least judicial review gives you a little opportunity to dissipate some of that hostility. Even if you lose, even if courts reject your claim, at least you have had a chance to go there. Even the Supreme Court of the United States permits you to petition for certiorari.

Mr. **Wilson**. Thank you, Dean.

There has been a suggestion there be an independent Court of Veterans' Appeals. Could you please briefly discuss that issue?

Mr. DAVIS. That suggestion has come up many times. It has some superficial logic to it. The American Bar Association is on record as opposing courts of special jurisidiction, and one reason for that is that such courts tend to become themselves quite narrow because the judges do not have the experience and the perspectives that come from having to deal with other types of cases. That is a very difficult proposition to prove, but I think most lawyers who have had experience with our system would agree; that a judge who has had an opportunity to adjudicate cases across the full spectrum of the human condition is likely to bring better judgment and insight to a particular case than judges who have specialized only in one type of case. I think that would be true here.

I would not like to see a specialized court. I think actually it would be an inefficient use of resources because if the docket got reduced for some reason, you would have people already appointed with no other jurisdiction to exercise. That's a practical reason for being opposed to it.

Mr. WILSON. Turning to a different subject, would you believe that bar associations would police so-called outrageous fees that might be paid as compared to a $10 limitation——

Mr. DAVIS. I don't think we do it as much as we should, but I think we do a pretty good job. I think we do a better job of keeping our house clean than our medical brethern do. I think we can document that.

Mr. WILSON. I just have one final question, Mr. Chairman.

On page 3 of your testimony, you say "This 'no review' clause," that means the nonreviewability clause, "crept into the law as a provision of the so-called 'Economy Act' of 1933, a part of which was designed to give the Veterans' Administration unrestricted power in the administration of its programs." Then, later on, you say that was an era of "economic fascism."

I think you might find, Dean, that this has been in the law since 1887 under something called the Tucker Act and did not come into play with the Economy Act of 1933.

Mr. DAVIS. Well, I don't want to contradict you at this point because I don't have my research here in front of me. But I did the research on that for my 1964 Indiana Law Journal article, which was the one dealing with this subject.

My recollection was that there was earlier language in the Tucker Act which restricted review, but the language of the Economy Act of 1933 went far beyond anything that had ever been enacted before. Now, that's my recollection, but I could be wrong.

Mr. WILSON. I don't want to argue with you, either, but it does appear in the Tucker Act in 1887 in somewhat different form.

Mr. DAVIS. Yes, but I don't think it's quite as strong in the earlier version. But I could be wrong.

Mr. WILSON. Thank you, Mr. Chairman.

Mr. EDWARDS. Does Mr. Evans seek time?

Mr. EVANS. Yes, Mr. Chairman, just a few followup questions on this specialty court.

Wouldn't, in fact, a specialty court require a special code of regulations, or at least their own court procedure?

Mr. **Davis.** Well, they would probably have their own rules, sure.

Mr. **Evans.** So there would be an expense in putting that together and the expense of setting up a special court. There would also be the expenses incurred by the individual litigants in taking their cases to, say, Washington, D.C., to centralize that process. If you take it out of the 94 district courts, you're going to have a process in which only those people who can afford to come to Washington for a proceeding are able to participate.

Mr. **Davis.** Well, I think you're right. It doesn't necessarily involve coming to Washington. They could run it the way they ran the old Court of Claims and have commissioners hear cases in the cities around the country.

But the whole idea of a specialized court—I'm not an expert on judicial management or procedure—but just commonsense tells you that it is going to be more expensive, and because it has a limited docket, you have the manpower there and it can't adjust to the changes in the docket, which of course is possible in your regular district court.

Mr. **Edwards.** As one of the authors of the bill, I would resist any amendment that would set up a specialized court. I think we would do better with the general jurisdiction that the Federal district courts have.

Thank you very much.

Mr. **Davis.** Thank you.

Mr. **Edwards.** And you might send us that. Do you still have a copy of that article?

Mr. **Davis.** I might have one or two kicking around.

Mr. **Edwards.** We would appreciate your sending it to us.[1]

Mr. **Davis.** Thank you very much, Congressman, Mr. Chairman.

Mr. **Edwards.** Our last group of witnesses will constitute a panel. We have John Terzano, legislative director of the Vietnam Veterans of America, who is accompanied by David F. Addlestone and Barton F. Stichman of the VVA Claims Department; Philip E. Cushman, executive director of Veterans Due Process, Inc.; and Frank E. G. Weil, who is national secretary of the American Veterans Committee.

Without objection, all of the statements will be made a part of the record. Mr. Terzano.

STATEMENTS OF JOHN F. TERZANO, LEGISLATIVE DIRECTOR, VIETNAM VETERANS OF AMERICA, ACCOMPANIED BY DAVID F. ADDLESTONE AND BARTON F. STICHMAN, VVA CLAIMS DEPARTMENT; PHILIP E. CUSHMAN, EXECUTIVE DIRECTOR, VETERANS DUE PROCESS, INC.; AND FRANK E. G. WEIL, NATIONAL SECRETARY, AMERICAN VETERANS COMMITTEE

STATEMENT OF JOHN F. TERZANO

Mr. **Terzano.** Thank you, Mr. Chairman.

I would like to introduce Mr. David Addlestone, who is on your left, and Mr. Bart Stichman, who is on your right, who represent the VVA Claims Department.

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[1] See "Veterans' Benefits, Judicial Review, and the Constitutional Problems of 'Positive' Government," by Frederick Davis. Retained in committee files.

We are here today, Mr. Chairman, to discuss an issue that is of the highest priority of not only the Vietnam Veterans of America, but should be of this Congress. Judicial review is an issue that has garnered broad bipartisan support over the years. That support has come from veterans' organizations, the past administration, the Senate, which has passed this legislation in the 96th, 97th, and 98th Congresses, and yes, Mr. Chairman, even the Veterans' Administration has supported judicial review in the past.

This support is based on fairness and equity, that veterans be given equal access to the courts as their nonveteran peers. But there is an additional reason. Many are unaware that there are inequities within the veterans system of service-connected disability benefits. Let me give you a case in point.

Let's say a private and a captain are both wounded in combat and have comparable injuries. The officer opts for the military disability retirement system, since compensation will be made on his base pay and thus allow him to receive more money under that system. The private opts for the VA compensation system because under this system he will receive more money. Both veterans disagree with the disability rating that has come down from the Board of Veterans' Appeals. The private has his claim adjudicated in the VA system and gets turned down, but he has no recourse for he must abide by the VA decision. The officer, on the other hand, goes to the Board for Correction of Military Records and he also gets turned down. But the decision of the BCMR is reviewable by a court and the officer files a claim in the district court and is awarded a higher disability rating.

Two men, Mr. Chairman, with the same injuries, opt for the system that benefits them the most. They both disagree with their rating, and one can go to court and one cannot. That, Mr. Chairman, is clearly wrong.

Opponents of judicial review argue that the cases are so complicated that the Federal courts do not have the expertise to review the claims. This argument, Mr. Chairman, is pure myth. Veterans claims are simple. Bottom line, what the courts will decide is if the veteran is suffering a disability and was it caused by the service. Federal courts for decades have reviewed the most complex of agency decisions. The questions of whether the veteran has a service-connected disability is rather a very simple issue. Also, it should be noted that the Federal courts refer to the VA rating schedule in review of Correction Board cases as the bible for ratings and have for decades interpreted and applied the so-called complex set of guidelines under the military disability retirement system.

I must say, Mr. Chairman, that I was appalled last week when I heard the representative from the Justice Department say that it would be too costly to provide veterans judicial review. I think this country is in a sorry state when your concern for dollars is more important than our concern for justice. But what is even more appalling is that the Justice Department cannot provide good, hard, factual data on why it would be too costly. I submit, Mr. Chairman, that judicial review would streamline the system.

One of the beneficial byproducts of introducing lawyers to the system is that, if the case is no good, it won't go to court. In fact, less cases will be handled. Judicial review would stop the frivolous adjudication of many claims and would therefore make the system less costly.

Some also believe that the removal of the fee limitation and the introduction of lawyers into the VA system would harm the VA's decisionmaking process. Arguments against such representations suggest that lawyers would unnecessarily complicate the process, create an adversary relationship between veterans and the VA, and that simply suggesting the notion of lawyer representation before the VA is an indictment of the current adjudication system. To suggest that lawyers should be able to represent veterans who want lawyers before the VA does not mean that the current system is either unfair and different or a failure. On the contrary, the right to choose a representative does not depend on any shortcomings of an adjudicative system. Rather, the right to seek legal assistance should stand alone as an option for all citizens. The $10 fee limitation serves as a barrier to lawyers, created by Government regulation. Eliminating the prohibition would open the system to more free choice and a free market.

VVA sincerely believes that the introduction of lawyers and other legally trained professionals into the VA will improve the system. There are several specific benefits we feel that lawyers can add to the system. Let it be clear, Mr. Chairman, we are not advocating replacement of service organization service representatives with lawyers. We are advocating that veterans receive the benefit of an additional option.

The most important function that lawyers can serve at the VA, as they have in other Federal agencies, is that of a mediator between the veteran and the agency. The typical lawyer who advocates before an administrative agency does not fit the stereotypical image of adversarial, trial-type litigators, the image created by some who oppose lawyer participation at the VA. Persons familiar with Federal agency practice know that the role of an administrative advocate is far different from a courtroom litigator. The administrative lawyer frequently acts to explain a complex agency to a client and attempts to clarify issues for both the client and the agency. The reason why lawyers would function this way is obvious. The VA is not an adversary process and there is no attorney on the other side to argue against.

An even more telling point against the argument that lawyers will somehow infect a system is to look at the Board of Veterans' Appeals itself. The BVA has 15 sections, each with three members. Fourteen of the fifteen sections have two of the three members who are lawyers. In the 15th section, all three members are lawyers. In addition, each section has seven or eight staff attorneys. In short, the entire decisionmaking process is monopolized by attorneys. Everything is done in legalistic terms. To argue that allowing the veterans to have a lawyer will infect the process with legalism ignores the reality of the process as it now exists.

In closing, Mr. Chairman, just let me say that the VVA is strongly opposed to the creation of a specialty court. Specialty courts would be dominated, in our opinion, by the agency that it is reviewing and would, in fact, be more expensive for the simple reason that a specialty bar would arise here in D.C. Whereas if a veteran can file in a district court in his home town, you are providing equal access to all veterans across the country and not just a few who can come here to Washington.

I thank you and we would be pleased to answer any questions.

[The statement of Mr. Terzano appears at p. 228.]

Mr. EDWARDS. Thank you, Mr. Terzano.

I believe you're next, Mr. Cushman.

STATEMENT OF PHILIP E. CUSHMAN

Mr. CUSHMAN. Thank you, Mr. Chairman, and members of the subcommittee. I am Philip Cushman, the executive director of Veterans Due Process, based out of Portland, Oreg. I am also an ex-marine combat veteran. I appreciate the opportunity and the honor to testify before you today.

I would like to first request that my full prepared written statement be made a part of the formal record.

Mr. EDWARDS. Without objection.

Mr. CUSHMAN. Many times when I have been traveling around the country discussing this problem with people, I find many people aren't even aware of what due process of law is. We tell them that it simply is the right of every American to be able to demand that our Government make decisions consistent with the facts and the applicable laws in decisions which it makes which affect our lives, or that it gets right down to fundamental fairness.

In the experience that I have seen veterans have with title 38 U.S.C. 211(a), which effectively closes every court of law in America to veterans and title 38 U.S.C. 3404, 3405 which denies them the basic right to hire an attorney—and it is interesting to note that the Veterans' Administration has approximately 750 attorneys on its staff—and veterans are also denied the protections of the Administrative Procedures Act of 1946, which was passed primarily to protect the rights of the American people from being violated by agencies of the Federal Government, and other statutes within title 38, U.S.C., such as 4004(c), which makes the Board of Veterans' Appeals bound in its decisions by the instructions of the Administrator of the VA, which we believe can override requirements of law and sometimes the facts of a case, we believe that these laws do, in fact, violate due process of law.

We ask ourselves a question: Why should the Government pass laws like that affecting any citizen? Is it to insure that the demands of justice and law are met? That just seems too ridiculous for words. This deprivation, in our opinion, is unconscionable and constitutes a mockery of justice. That is why Veterans Due Process particularly pursues this problem with the intensity that we do.

It also seems to us that, unfortunately, these laws seek out in particular the people who are actually injured defending the Constitution. As you know, there are a lot of injured veterans—in Vietnam, for example, I believe there is something like 3.8 percent of Vietnam-era veterans who were injured in that conflict. It is my understanding that, of those, half did not require hospitalization. It seems that the vast majority of veterans never have any reason to run into these laws that we are talking about, but people who do pay the price, who in fact are injured on a field of battle, can run into these laws and they are generally in no way prepared physically, emotionally, psychologically, financially, in any way to cope with this system that they run into. I don't believe in grinding my own ax, but I have had experience with the system, as a lot of other people in this room have.

It has been our finding that the basis of a veteran's problems with the Veterans' Administration really makes no difference. As to whether it's a personality conflict between the veteran and somebody at the VA, or a *function of agency budgetary constraints*, or a simple mistake or computer error or whatever; the results can be the same. Both the facts of a veteran's case and the applicable laws in title 38 United States Code can be ignored.

Recently I was in your office, Congressman Edwards, and I saw a poster on your wall that I especially related to with respect to this problem. What it was was the Bill of Rights, and stamped right in the middle of it with a big red stamp it said "Void Where Prohibited By Law." I looked at that and I thought this is exactly and vividly what we're talking about here. As a matter of fact, I wanted to bring that poster to the hearing today just to share it with the people.

Veterans Due Process does not seek any preferential treatment under the law for veterans at all. We just believe that veterans should simply have the rights that other claimants before other agencies of the Federal Government enjoy; that certainly we should have the same protections of the Constitution enjoyed by the most heinous criminal which seemingly we as a nation readily afford to them, just basic constitutional due process of law protections.

Veterans Due Process believes that Vietnam veterans, atomic veterans, and so forth, are in special need of the due process protections of law which we discuss here today, because many of their complaints seemingly do not fit the mindset of the bureaucracy which is tasked with helping them. We often hear that the Vietnam veterans have been stereotyped in the minds of many of the American people, and we fear that stereotype has spread to many people who work with the VA and large veterans organizations who now enjoy exclusive representation and decision power over veterans. I know that John Terzano and myself and quite a few other people in the room are Vietnam combat veterans and we perceive ourselves as being the average Vietnam veteran.

The VA and some of the organizations which I referenced appear to be primarily controlled by veterans of earlier wars—at least that's my experience in having dealt with some of them. We have often seen where they seem to be less sympathetic to the plight of the Vietnam veteran and perhaps the delayed stress syndrome and the atomic veteran. Some people believe that the Vietnam veterans lost the war, which is debatable. I know that we feel that we really didn't lose the war; we fought and we fought hard, as other Americans had in other wars before us. The war went on for a long time and didn't work out as a lot of people thought it would. It seems to me that quite often both the war itself and its loss are laid on the backs of the people that fought it and we don't really perceive that as being very fair. That can work to our disadvantage in situations such as this. We believe that is partially why Vietnam veterans are particularly in need of the due process of law protections of the Constitution for which we fought and were often injured defending.

We believe the present Veterans' Administration's primary concern, based on the thousands of telephone conversations we have had with veterans around the country, is perhaps not to the degree which it once was, as phrased by Abraham Lincoln in his second inaugural address, when he so eloquently phrased "To care for he who hath borne the battle, and his widow, and his orphan." We believe perhaps to a degree that the Veterans' Administration now is interested in large part in perpetuating itself and its 250,000 employees and its 750 attorneys and its $26 billion a year budget, and that perhaps Abraham Lincoln's statement has deteriorated to a degree, to the point where we look at it now as being "To care for he, who cares for he who hath borne the battle." That is not always the case, but it seems to us sometimes, especially in decisions that I have seen, that that can be true.

We look at the unanimous Senate action in support of judicial review during the last three or four sessions of Congress. It is certainly a strong indicator as to both the seriousness of this issue and of its merit as an issue.

As far as the scope of review, I am not an attorney. We at Veterans Due Process defer to people who are knowledgeable in the technicalities of law, such as the National Veterans Law Center, such as my friend Fred Davis, the dean of the University of Dayton Law School. It is simply our belief, being laymen, that if you have a veteran's case and a set of law books, title 38, United States Code, that the applicable law should be applied to the facts and that the decision that is ultimately rendered should be consistent with the facts and the law. As to what particular handle, or what title, substantial evidence test or whatever ultimately you want to call it, that's fine. That is just the effect we would like to see.

As for attorneys fees, in reviewing the legislation as we have, we feel that certainly veterans who have been injured on the field of combat defending the country, that we as any other citizen should be allowed the right to counsel that we fought to protect. It seems that even in some of the existing legislation the dollars in question still constitute limitations that preclude to a degree that basic constitutional right.

From a personal standpoint, as an ex-marine combat veteran, I know what it is like to skid up on the beach of a foreign land in an amphibious landing craft, or to jump out of a helicopter into a hot LZ, as we used to refer to them as, a hot landing zone, into machinegun fire. I was at that time under the illusion, the same illusion that the majority of the American people are under right now, that veterans have due process of law protections. I was shocked, as are the American people who we make aware of this situation across the Nation. I suspect that had I known when I was in Vietnam, what I know now, I'm not sure I would have jumped out of that helicopter, into that machinegun fire, with the same degree of enthusiasm that I did 18 years ago.

One of my favorite sayings that I believe is particularly applicable to this situation was uttered I believe in these halls a couple of hundred years ago by Thomas Jefferson, when he simply said that, "in questions of power, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution." I would dearly love to see the Veterans' Administration brought more under the control of law. I believe that is what we're looking at.

I believe that the fact that these laws affect veterans, in our opinion is particularly tragic and certainly ironic, as many of them were injured defending the Constitution, but that is really not the point. The point as we perceive it is the integrity of the Constitution of the United States. What we are looking at is basic, fundamental fairness which we believe so often is lacking in the Veterans' Administration process.

I believe one of the Supreme Court Justices once upon a time stated something to the effect that total discretion, which is what the Veterans' Administration enjoys to a large degree today, is more destructive of freedom than any of man's other inventions.

As far as the special court is concerned, we have thought seriously about that. How we perceive it, from our laymen's point of view, would be more or less just another layer of icing on the existing bureaucratic cake, that it would just constitute another large degree of wasted expense for the American taxpayer. We don't believe that the veteran, as I said, should have preferential treatment under the law, but if the veteran believes in the final analysis, after he has gone all the way through the VA system, that justice has not been served, that that person should be able to go out and hire an attorney and pursue it into a court of law.

As far as the special court, we fear that earlier decisions of the Board of Veterans' Appeals would just simply be rubber stamped. That fear exists, especially on my part.

The VA, when it was testifying a few minutes ago, made reference to judicial review of the VA being something like a situation wherein a Federal district court would be reviewing the decisions of another Federal district court. I don't think that that's what we're talking about here. I think what we're talking about is an impartial review of the decision of an agency of the Federal Government. I think the really key word here is "impartial," outside of the agency.

We believe that judicial review could just serve as a mechanism to insure that the decisions in a veteran's case are consistent with the facts and applicable laws.

I believe that's about all that I have. In my written testimony I made reference to a letter written by a Mr. Norman Johnson, who was a former staff legal advisor to the Board of Veterans' Appeals. That is part of the report that Dean Fred Davis did for the Administrative Conference of the United States back in 1978. As I indicated in my statement, I would strongly recommend that members of this committee read that study because it cites a lot of cases of abuse. I believe the potential for that abuse has not ceased to exist since 1978, and as a function of budgetary constraints, perhaps it is even more important now that it be revised.

In that letter, the staff legal advisor for the Board of Veterans' Appeals said "I want to leave you with one final example of BVA attitudes. I once drafted and dictated an appeals decision granting service connection status for a black Korean action veteran. The elements of the case were clear. His induction physical examination report indicated normal feet. The separation physical indicated pes planus, or flat feet, not an unusual development over the course of Army service and one that can be painful and limiting for all of the jokes that are made of it. The facts and the law were clear, but the decision was returned to me with instructions to deny the claim.

"I found it difficult to evade the letter of the law and I considered it dishonest to arbitrarily deny the facts in order to reach the decision my supervisor desired. I asked the section chairman why the decision was to be a denial. He explained that it was because the veteran was black and all black people eventually get flat feet. It was a 'racial characteristic.' I now wonder how many decisions were written or decided by that man in this 30-odd years with the Board of Veterans' Appeals." We believe that judicial review certainly could have had a bearing on that situation.

I would also like to particularly direct your attention to the comparative rights sheet, which is one of the sheets attached at the end of the written testimony we have given, to the plight of Pvt. Leroy Baily. Situations like that are awfully unfortunate. I wouldn't want to try to read this entire statement to you. I am not known for my brevity anyway, but I would just like to——

Mr. EDWARDS. We're starting to run out of time, Mr. Cushman, so, if you could conclude your statement.

Mr. CUSHMAN. Very good.

Mr. Chairman and members of the subcommittee, on the basis of this and the other testimony which you have heard during these hearings on judicial review, I urge that you support the passage of a meaningful form of judicial review for America's veterans.

This concludes my statement and I would be glad to answer any questions that I can.

[The statement of Mr. Cushman appears at p. 251.]

Mr. EDWARDS. Thank you, Mr. Cushman.

I believe Mr. Weil is next. Mr. Weil is National Secretary of the American Veterans Committee.

STATEMENT OF FRANK E. G. WEIL

Mr. WEIL. Thank you, Mr. Chairman.

In addition to being secretary of the American Veterans Committee, I am also chairman of their Veterans and Armed Services Affairs Commission. In that capacity, this is about the third time I have testified on the subject. Both in 1977 and 1979 I had the privilege of testifying before the other body. I would like my written statement to be incorporated into the record and——

Mr. EDWARDS. Without objection, so ordered.

Mr. WEIL. Thank you, Mr. Chairman—and possibly the written statement submitted to the Senate on those two occasions, copies of which we can make available.[1]

I will not go over the ground that has been plowed here again and again this morning, but would simply associate myself with the remarks made by Dean Davis. I thought his testimony was quite cogent.

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[1] Retained in Committee file.

I will go on to two or three matters that have not been covered that are included in the pending legislation. First, there are two versions of a proposal to expand the Board of Veterans' Appeals. Of the two, AVC believes the provisions of H.R. 2936 are superior to those of section 105 of Senate bill 636 because it is much simpler. We also disagree with the wording of proposed 4009(c) of the Senate bill which allows judicial review in case of medical disagreements. Medical disagreements should be reviewable to the same extent as other disagreements in the record.

We agree with the idea that the VA should be subject to the Administrative Procedure Act and disagree with the italicized words which were inserted, I believe, at the last moment in the Senate, that the APA coverage be limited to matters other than agency management, personnel, public property, and contracts. The virtue of the APA is that it applies across the Government, and if the other agencies can manage matters of management, personnel, public property and contracts under the APA, so should the VA.

I am indeed sorry that the distinguished General Counsel of the Veterans' Administration did not decide to remain for the rest of the hearing. I think he might learn a number of constructive matters. One of the things I would like to call to his attention, as well as that of the subcommittee, is the existence of the U.S. Claims Court. As a result of recent reorganization, it is a part of what used to be the Court of Claims and it is a court from which lie appeals to the U.S. Circuit Court for the Federal Circuit. The function of that court is to hear claims against the government, and if a VA claim is anything, it is a claim against the Government.

Many situations that arise in the VA setting have also arisen in other cases, and the personnel of the U.S. Claims Court have the expertise. They don't deal with just narrow categories, so I don't think there is a danger of them becoming a rubber stamp. I would suggest—nay, I would urge—that the judicial review at least allow submission to the U.S. Claims Court and not be limited to the district courts. I think the VA's objection to there being 94 different kinds of law would be somewhat reduced if the U.S. Claims Court—which has national jurisdiction, and commissioners do travel throughout the country—be the court to which these matters can be appealed. The appeals lies to the U.S. Circuit Court for the Federal Circuit, which is an article III court, equal in dignity to all the other U.S. circuit courts.

I would like, in addition, to say a few words about the proposals on attorneys' fees. First, thank God, the proposal goes in some way to remove this ridiculous $10 limit. However, even the proposal, as I understand it, that came out in the Senate is too limited. In the first place, it keeps the $10 fee for matters within the VA. I submit that this would be pushing cases into the courts. If the attorney cannot be compensated until after the matter leaves the VA, you will have the usual pro se representation or a representation by nonlawyer service officers, many of which are excellent but some of whom are new at the job, and everything will be pointed to court review; whereas if it is possible for attorneys to come in at an earlier stage, many of these cases will not reach the courts because the decision will be favorable at an earlier stage.

Then the other provision is that the attorneys' fees may be based only on a portion of past due awards. I submit, Mr. Chairman, this will tend to cause attorneys, at least those who are doing it mainly for the fees—and there will be some who are—to delay submission. We will see filings 2 days before the statute of limitations expire, on the theory that the amount of past due money from which the attorney may get a portion is thereby increased. I submit that the attorneys fees should be allowed to come out of both past due benefits and benefits to become due, with a ceiling, of course, with proper safeguards, of course. But I would like to remove the incentive to delay submission to the courts in order to build up the fund from which the attorney could be paid if this restriction continues into the law.

Thank you, Mr. Chairman. I shall be happy to answer any questions.

[The statement of Mr. Weil appears at p. 262.]

Mr. EDWARDS. Thank you, Mr. Weil.

Do any other members of the panel desire to testify? Then I recognize the gentleman from Illinois, Mr. Evans.

Mr. EVANS. Thank you, Mr. Chairman.

The VA indicated today, through their General Counsel, that they were afraid of inconsistent precedents being raised should judicial review be enacted. Would Mr. Stichman care to comment on that?

Mr. STICHMAN. Yes. I really don't think that's an accurate statement about what would happen if we went to judicial review. For one thing, most cases that are going to go to court will be tied to the facts of the case in the sense that the judge is going to rule whether the facts show that the veteran is entitled to benefits or not from a standard of review of arbitrary and capricious. So when you have a decision in one case on that, it is not easily transferable to another case. Each case is different as far as the facts are concerned, and will be judged on a case-by-case basis.

To the extent there are cases in which the issues before one district court will be the same as before other district courts, district courts do follow precedent. They do read other district court decisions and, although they are not bound by another district court decision, they do review those decisions and are persuaded by them.

Now, if you look at the Board of Veterans' Appeals, on the other hand, their rules state that they are not bound by the decisions of another panel of the Board of Veterans' Appeals. There is no precedential value whatsoever. So there is an argument to be made that, if you allow court review of veterans decisions, there would actually be more uniformity in decisionmaking by going to courts which do review other written decisions by district judges than if you allow the process to stop at the Board of Veterans' Appeals.

Mr. EVANS. There was a concern last week on this committee—at least by one member—that this is just a bill that is going to affect those people that have agent orange or radiation exposure kinds of problems. It is a particular concern to Vietnam veterans. Do you have a comment or an opinion on whether it affects more than just merely those people who have agent orange or radiation exposure problems?

Mr. **Terzano**. It will, Mr. Evans. What we are talking about here is something that just goes at the core of veterans' issues and veterans' rights. To be honest with you, I am not sure what a court would do with an agent orange claim at this stage of the game. You probably, in fact, might not even get a lawyer who would be able to take a case if we had judicial review.

I think it is much broader and it is just at the core of veterans' rights.

Mr. **Cushman**. It is the position of Veterans Due Process, after analyzing the different problems that veterans of every war have, that they all boil down pretty much to one common denominator, and that is the lack of judicial review. They all come down to the need for a veteran to have access to a fair and impartial court of law and the right to an attorney.

Mr. **Evans**. Just one other concern, and it has been voiced by several people, and that is the cost to the individual litigant. How would that be addressed? There are a lot of people that suggest that if you introduce lawyers into the process, a lot of people aren't going to be able to be in a position to afford an attorney to represent them. Do you have a comment about that?

Mr. **Addlestone**. Well, the claims program that VVA set up is using attorneys, in fact, using volunteer attorneys, and would presumably use volunteer attorneys to handle court cases should judicial review occur. Legal aid attorneys currently handle veterans cases—as long as the Legal Services Corporation is funded, of course. If the case has any hope of monetary recovery, I assume someone will be able to hire an attorney. It would be more difficult if they have to come to Washington to appear before a specialty court, but usually there are plenty of attorneys willing to handle cases like this.

The average case, the average veteran—that's kind of our approach to this problem—will involve a relatively small claim and they are probably going to be represented by a brother-in-law or a friend or a neighbor, somebody like that. I don't view these cases as that complicated.

A lot of generalized posturing has been made by some opponents of the legislation that some general sort of harm is going to occur, and a lot of words are thrown around about adversary process. That doesn't really deal with the reality of what a Federal court lawsuit involves. A review of claims like this are relatively simple. I mean, is the VA's decision arbitrary and capricious? For example, if there is one doctor that says yes and one doctor that says no, and the opinion doesn't fall flat on its face, there is no prospect to win in court. Most lawyers who have done any administrative practice can see that immediately. I mean, less than 1 percent of the cases I have seen over the last 15 years would not even be arguable in court. Also, I think lawyers will serve a great service by weeding out a lot of meritless cases.

Mr. **Evans**. Just one final concern that I think has been addressed by some people on the committee is the fact there would be no function for the Board of Veterans' Appeals should we have judicial review. That just does not seem to be the case. The judicial review bill, I understand, would continue the BVA process.

Do you see any change in that process on an administrative level?

Mr. **Terzano**. No, there will be no change at all, Mr. Evans. You are correct. The current legislation, Mr. Edwards' legislation and Mr. LaFalce's legislation, currently has in the bills provisions that allow the VA to keep its informal system and nothing is going to change. The service officers aren't going to change. The veterans' organizations will still have service officers across the country. All we are doing is asking to allow veterans an added option, and that is to bring lawyers into the process.

Mr. **Evans**. Thank you.

Mr. **Addlestone**. If I could add to that, the analogy that we have made to the Board for Correction of Military Records and the Discharge Review Board system is somewhat apt here. Those Boards—and each service has one of each Board—handle 35,000 cases, approximately, a year and the denial rate is approximately the same as for the Board of Veterans' Appeals. Yet only a few hundred of those cases go to court every year. Applications are represented by service officers and lawyers at these Boards.

It seems to me to be a very apt analogy. A lot of the claims are very similar in the sense that military personnel matters are involved, such as line of duty, aggravation of injuries, character of discharge. There are a lot of cases involving disability retirement, which is quite aptly analogous to the VA system, much, much closer than the Social Security system. I think looking to these boards as a comparable scheme is probably the most accurate.

Mr. **Evans**. Thank you, Mr. Chairman.

Mr. **Edwards**. Mr. Daschle.

Mr. **Daschle**. Thank you, Mr. Chairman.

First of all, I want to compliment you. I know that we don't have many people here this late in the day and in this hearing, but I hope that you won't look upon the absence as any lack of attention given to the testimony you have presented. I think it really is a remarkable thing to have people come, as Phil has, to dedicate himself for weeks and weeks to write the testimony that he has, to present his case before this committee as professionally as he did.

Mr. Weil and John, I just want to say thank you because I think it is a very important process and I hope we all recognize how important your testimony is and the kind of comments you made this morning are to this process. You have presented yourself once again extremely well and I am honored to be here to take that kind of testimony and to share your views and your input on this most important issue.

The Veterans' Administration made a comment in their statement that I would like you to address, because I think this is a fundamental concern within the Administration that goes beyond the legal question. I have saved this question simply because I believe it is important for you, as veterans, to address this more than it is for lawyers or anyone else.

That question relates to their statement that judicial review might benefit a few individuals, but "we would see this whole process work to the detriment of veterans as a class by disrupting the informal, nonadversary procedures and the cooperative attitude presently existing between claimants, their representatives, and the VA." In essence, they seem to be saying, "Look, for the advantage of 2½ percent, you are going to disadvantage 97 percent."

How do you feel about that? You, as a group, are probably among that 97 percent.

Mr. **Cushman**. I don't really look upon the existing VA system as being nonadversary to the degree that a lot of people do. I believe that any time two people are in conflict with one another there is an adversarial relationship there.

As for the formality, it has said that if this legislation passes that perhaps it will introduce a little bit more formality into the system. Perhaps the Veterans' Administration, if it realized it might one day have to attempt to defend its decisions in a court of law, would have to formalize the record a little bit more. But to offset that to a degree, we think that if veterans had access to attorneys perhaps a little bit earlier on, it might act as a filtration mechanism in order to sift out cases which perhaps aren't meritorious. Some of the money saved there might offset some of the increased financial needs for any formality that is introduced into the system as other cases proceed through the VA process. A certain degree of formality would be necessary in order to generate a record sufficiently formal to pursue into a court of law.

Mr. **Daschle**. John.

Mr. **Terzano**. One of the interesting things, Mr. Daschle, whenever the VA makes its comment about it being an adversarial relationship if we introduce lawyers into the system, is that they don't come up with an example on how it is going to become an adversarial relationship. A lawyer is not going to take an informal system that we have, like the Board of Veterans' Appeals, and turn it into an adversarial relationship. He would be a fool to do that because it is that informal system that helps and benefits his client. He is not going to turn that around and make it an adversarial relationship.

You know, maybe what we should do is probably eliminate all judicial review for everything. Maybe then they'll be happy. The Board for Correction of Military Records, which has judicial review, as David has mentioned, only sees a couple of hundred cases.

Mr. **Daschle**. If I can just refine my question just a little bit more, do you see—whether it's an adversarial relationship or a very cooperative one—that there is any detriment to those who utilize this process and who never avail themselves of judicial review? It seems to me that that is the case they are making, that to allow 2½ percent of our veterans that opportunity, we are necessarily then undermining the opportunity for other veterans to utilize the process we already have.

Mr. **Terzano**. I don't think you will undermine them at all.

Let's say, for example, GM, which produces a lot of different cars, 95 percent of their cars are very good cars and they have no problems. But 5 percent are lemons, and they could either be Cadillacs, Chevys, or Pontiacs. It's a broad spectrum. Those 5 percent have recourse. They have redress. That doesn't affect the other 95 percent who have good cars. Maybe that's an analogy you can use.

Mr. **Daschle**. Mr. Weil.

Mr. Weil. I think you need to look at this in perspective. The VA considers themselves the "Great White Father" of the veteran. They need to have a slogan which they can believe. The slogan is, "Look, we're all buddies here; we're doing it all in your best interests." The plantation owner used to say that his people were happy. I think those two remarks are comparable.

Mr. Daschle. Mr. Chairman, I see that I am out of time.

I have three statements that were provided to us by State legislators from Oregon. They had requested that we ask unanimous consent to insert those into the record. I would do so at this time.

Mr. Edwards. Is there objection? The Chair hears none. So ordered.[1]

Mr. Evans. Mr. Chairman, I understand the representatives are here.

Mr. Daschle. I don't know if they're still here or not.

Mr. Evans. They are here.

Mr. Edwards. They will be made a part of the record, without objection.

Mr. Evans. Mr. Chairman, could I ask that they be heard as a separate panel?

Mr. Edwards. After adjournment, as time permits. I am expecting a vote within 5 or 10 minutes, so we will certainly do the very best we can, Mr. Evans.

Mr. Evans. Thank you, Mr. Chairman.

Mr. Edwards. Mr. Addlestone, there has been some concern raised that increased attorneys' fees will cause a financial hardship for veterans. Do you think the enactment of this legislation will cause this hardship?

Mr. Addlestone. No. The Senate bill currently would, in effect, preclude the retaining of attorneys until after the case had been lost before the Board of Veterans' Appeals. Both House bills would retain the $10 fee limitation until after a statement of the case is issued.

So, as a practical matter, people with simple claims will have their claims taken through the first level of the process without a lawyer. But once someone has said "no," a person really wants to have an option of whether they're going to appeal with counsel of their choice. In the vast majority of cases the attorney is not going to end up taking much money from veterans.

If the veteran has lost at the Board of Veterans' Appeals, he will certainly, even if an attorney gets 25 percent or $750 in court, is going to have a lot more in the end than he started out with. So I think that's just another strawman argument that is set out.

Mr. Edwards. Thank you, Mr. Addlestone.

I echo the words of Mr. Daschle about the excellence of your testimony, all of the members of the panel. Only Mr. Davis, however, referred to particular cases—and that is very important in the House of Representatives—to have evidence of particular cases where justice was not done.

The Chair invites you to send us "horrible" examples, as we refer to them, because they are immensely persuasive. It is all very well to talk about the philosophy of due process, but we would like to know and we would like to be able to tell our colleagues where it is hurting Joe Smith, Jane Jones, who was denied his or her rights because this process is not complete and is not fair. So I hope you will take advantage of that.

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[1] See pp. 266, 279, 274.

Mr. Cushman?

Mr. CUSHMAN. Yes, Mr. Chairman. That is why in my testimony I made reference to Dean Fred Davis' administrative conference of the U.S. report, wherein there are numerous cases of abuse. Also, I have a record here of a Veterans' Administration case from a Mr. Arthur Cronin, who had asked that I present it to the committee if I had an opportunity. He certainly believes that he, for decades, has been denied justice.

We routinely tell veterans that we don't as a rule get into the individual merits of a veteran's case. It is simply our belief that they, like any other American, should have the right to air their grievances, if they firmly believe that they have been denied what statute law and justice would suggest they are entitled to.

Mr. EDWARDS. Thank you.

Mr. CUSHMAN. So I will put this into the record.

[The information appears at p. 277.]

Mr. WILSON. Mr. Cushman, in your literature that you have put into the record and in your testimony you made reference to a Mr. Leroy Baily.

Mr. CUSHMAN. Yes, I did.

Mr. WILSON. The facts on Mr. Leroy Baily are well known to the Veterans' Administration and to many people in it. He is a very famous case in the Chicago area. He has been hospitalized on many occasions and has been operated on, I think, some 30 times. I think he would disagree with the statement that this case required Presidential intercession. It did not.

Mr. CUSHMAN. I'm just quoting the book, sir.

Mr. WILSON. Mr. Chairman, I would like, on Mr. Hillis' behalf, to have the facts on Mr. Baily's case put into the record.[1]

Mr. EDWARDS. Is there objection? The Chair hears none. So ordered.

Mr. CUSHMAN. I was simply quoting from the book that is referenced there.

Mr. WILSON. I would think, Mr. Cushman, in all candor, that you should have checked that reference more thoroughly.

Mr. SHULTZ. Mr. Chairman, I have several questions, but due to the lateness of the hour, I would like to request permission they be submitted for the record and, if possible, I would like to ask one question.

Very briefly, I would just like to ask each of the organizations what effect introducing attorneys into the system—which I believe all of you agree should be done—what effect will that have on the representation that is currently being given by the veterans' organizations?

Mr. TERZANO. I don't think it's going to have any effect. We have implemented a lawyer-supervised, lawyer-directed claims program. We, like most veterans' organizations, utilize service officers who are employed by the States across the country. I see no detrimental effect at all by allowing lawyers to look over the claims at the beginning. In fact, it might even be more beneficial. As I mentioned in my written testimony, when you have got lawyers looking at the case from the outset and telling people that you don't have a case, that is going to stop frivolous claims from working their way through the system. I think the VA would admit that an overwhelming number of their claims currently at the Board of Veterans' Appeals are frivolous claims that have been readjudicated and readjudicated. By introducing lawyers into the system, you're going to streamline it and just better the system.

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[1] Not received at time of publication.

Mr. **Cushman**. The Veterans' Administration law is perceived as being a complex legal system, and by existing Veterans' Administration statutes, the veteran is really responsible to comply with all of the statutes and regulations. It has been my experience, in having looked at quite a few veterans cases, that sometimes the service officer perhaps isn't aware of all of these statutes and/or regulations that perhaps he should be in a given case. It is just our belief that attorneys are professionals, they are educated in gathering evidence and presenting it, and we just believe that could work to the advantage of veterans.

It is my understanding that service organizations' representatives aren't required to take a test or anything in order to demonstrate knowledge of this area of the law with which they're tasked to work. That causes me concern, because when I go up in a matter which literally concerns my life, which many of these situations do, I would like to know that I had the best professional and knowledgeable help available.

Mr. **Weil**. I believe it is likely to upgrade the system of representation. It will probably increase the number of times the nonlawyer service representative picks up the phone and talks to a lawyer before he goes out to present a particular claim, or it will increase the number of instances in which a lawyer will sit down and review the file and brief the service representative as to what to push, what to skip over lightly, and that sort of thing. So I think, on the whole, it will benefit all veterans.

Mr. **Edwards**. Are there any further questions, Mr. Evans?

Mr. **Evans**. No, Mr. Chairman.

Mr. **Edwards**. In that case, we thank the witnesses. We hope you will send us some more information, and the hearing is adjourned.

The Chair points out that quite a number of other people and organizations have requested to testify before this panel. I am not the chairman of this committee and I do not have the authority to continue hearing witnesses. But Chairman Montgomery assures me that any person or organization who desires to contribute to this important testimony should give us that testimony. It will be treated with great respect and it will be made either a part of the hearing or of the file as the testimony is reviewed.

[Whereupon, at 12:04 p.m., the subcommittee was adjourned.]

APPENDIX

Opening Statement of Hon. G. V. (Sonny) Montgomery

This morning the subcommittee will hear testimony on the issue of judicial review of veterans claims for benefits.

Section 211(a) of title 38, United States Code, states, "the decision of the administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have the power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

This bar to judicial review is of long standing but has been challenged on many occasions. Bills which would grant veterans the right to judicial review of decisions made by the administrator have been introduced and considered in the past. However, no legislation has been enacted.

The issue of far from simple. It does not limit itself to the question of whether or not the veteran is entitled to one more review of his claim. At issue is the entire nature of the VA's adjudicative process; the role of the veterans' organizations in that process; the issue of attorney representation and the fees to be permitted; the nature and scope of court review to be sanctioned; and the court of jurisdiction to be authorized.

We know that there are arguments which support retention of the current review process, as well as arguments which call for judicial review. In order to objectively evaluate those arguments, we have invited a number of distinguished and knowledgeable witnesses to testify and present their views on this subject. Hopefully, this testimony and the record of this hearing will provide us with sufficient insight to accurately determine which system of review best serves our veteran population.

I

98TH CONGRESS
1ST SESSION

H. R. 1959

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 8, 1983

Mr. EDWARDS of California (for himself, Mr. DASCHLE, Mr. EDGAR, Mr. SAM B. HALL, JR. Mr. LOWRY of Washington, Mr. OBERSTAR, Mr. RICHARDSON, and Mr. WYDEN) introduced the following bill; which was referred to the Committee on Veterans' Affairs

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A BILL

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATION PROCEDURES

SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to the claimant's claim.

"(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration on a claim for any benefit under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended by striking out "Applications" in the item relating to chapter 51 and inserting in lieu thereof "Claims,".

(2) The heading of such chapter is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(c)(1) The table of sections at the beginning of such chapter is amended by striking out "APPLICATIONS" in the item relating to subchapter I and inserting in lieu thereof "CLAIMS".

(2) The heading of subchapter I of such chapter is amended to read as follows:

"SUBCHAPTER I—CLAIMS".

(d) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 3006 the following new item:

"3007. Burden of proof; benefit of the doubt.".

SEC. 102. Section 3311 is amended by adding at the end the following new sentences: "Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing by registered or certified mail addressed to such individual at such individual's last dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.".

SEC. 103. Section 4001 is amended—

(1) in subsection (a)—

(A) by striking out "(not more than fifty)" and inserting in lieu thereof "(not more than sixty-five)";

(B) by striking out "associate"; and

(C) by inserting "in a timely manner" before the period at the end of the second sentence; and

(2) by adding at the end the following new subsection:

"(c) The Chairman shall submit a report to the appropriate committees of the Congress, not later than October 1, 1983, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the twenty-four months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of filing of an appeal and the disposition during the prior fiscal year, and the number of members and other professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as required by subsection (a) of this section.".

SEC. 104. Section 4002 is amended by striking out "associate" each place it appears.

SEC. 105. Subsections (a) and (b) of section 4003 are amended by inserting ", after notice to the claimant of such additional information together with an opportunity to be heard in connection with such information," after "concerned" both places it appears.

SEC. 106. Section 4004 is amended—

(1) by inserting "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law" before the period at the end of the second sentence in subsection (a);

(2) in subsection (b)—

(A) by striking out "in the form of official reports from the proper service department"; and

(B) by adding at the end the following new sentence: "A judicial decision upholding, in whole or in part, the disallowance of a claim under chapter 72 of this title shall not diminish the Board's discretionary authority under this subsection to reopen the claim and review the Board's former decision."; and

(3) by amending subsection (d) to read as follows:

"(d) After reaching a decision in each case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact, law, and matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief.".

Sec. 107. Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

Sec. 108. Section 4009 is amended by adding after subsection (b) the following new subsection:

"(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and, after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the

Board under this subsection, including any such denial, shall be final and conclusive and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, chapter 72 of this title to the contrary notwithstanding.".

SEC. 109. (a) Chapter 71 is amended by adding at the end thereof the following new sections:

"§4010. Adjudication procedures

"(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

"(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations of the Administrator, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

"(c) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

"(1) at a reasonable time prior thereto as well as during such proceeding, to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(2) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations of the Administrator, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(3) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(4) to submit rebuttal evidence;

"(5) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(6) to serve written interrogatories on any person, including employees of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

The fee provided for in clause (1) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on account of the party's inability to pay or for other good cause shown. In the event of any objection, filed under clause (6) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered. If any person upon whom interrogatories are served under this section fails to answer or fails to provide responsive answers to any such interrogatories within thirty days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena pursuant to section 3311 of this title (with enforcement of such subpena to be available pursuant to section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within one hundred miles of where such person resides, is employed, or transacts business.

"(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

"(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, and shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places and, on the payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on account of the party's inability to pay or for other good cause shown.

"(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

"§ 4011. Notice of procedural rights

"In the case of any denial, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with denial after an initial review or determination and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notices shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the

Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end the following new items:

"4010. Adjudication procedures.
"4011. Notice of procedural rights.".

SEC. 110. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) assuring the resolution of claims before the Administrator of Veterans' Affairs for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 107 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely basis as possible for each claimant, the Administrator shall conduct a study, commencing not more than one year after the date of the enactment of this Act, for a period of between twenty-four and thirty-six months, in at least six geographic areas and at least six regional offices of the Veterans' Administration, involving two alternative methods for resolution of claims.

(b)(1) In at least three such geographic areas, the Administrator shall provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of such section 4005(d) or 4005A(b) to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title 38) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of such section 4005(d). Such new statement of the case shall, for all purposes relating to appeals under chapter 71 of such title 38, be considered to be a statement of the case as required by paragraph (1) of such section 4005(d).

(2) In at least three other such geographic areas, the Administrator shall provide for an enhanced schedule of

visits, on at least a quarterly basis each year, by a panel or panels of the Board of Veterans' Appeals to conduct formal recorded hearings pursuant to such section 4002 in such areas.

(c) Not later than six months after the completion of such study, the Administrator shall report to the Congress on the results of the study, including an evaluation of the cost factors associated on an annual basis with each alternative studied and with any appropriate further implementation thereof, the impact on the workload of each regional office involved in such study, and the impact on the annual caseload of the Board of Veterans' Appeals resulting from each alternative studied, together with any recommendations for administrative or legislative action, or both, as may be indicated by the results of such study.

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

"§ 221. Rule making

"Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator shall be subject to the requirements of section 553 of title 5.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following:

"221. Rule making.".

TITLE III—JUDICIAL REVIEW

SEC. 301. Subsection (a) of section 211 is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and chapter 72 of this title".

SEC. 302. (a) Part V is amended by adding after chapter 71 the following new chapter:

"CHAPTER 72—JUDICIAL REVIEW

"Sec.
"4025. Jurisdiction.
"4026. Scope of review.
"4027. Remands.
"4028. Survival of actions.
"4029. Appellate review.

"§ 4025. Jurisdiction

"(a) Except as provided in subsection (h) of this section, after any final decision of the Administrator (as defined in subsection (c) of this section) adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within one hundred and eighty days after the mailing to the claimant of notice of such decision pursuant to section 4004 of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

"(b) In any matter not directly involving a claim for benefits under any law administered by the Veterans' Administration, section 211(a) of this title shall not operate as a bar to a civil action otherwise authorized by law.

"(c) For the purposes of this chapter and section 3404 of this title:

"(1) The term 'final decision of the Administrator' means—

"(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004(a) or 4004(b) of this title; or

"(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title.

"(2) The term 'claim for benefits' means—

"(A) an initial claim filed under section 3001 of this title;

"(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

"(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

"(d) The provisions of this chapter shall not apply to matters arising under chapter 19 or 37 of this title.

"(e) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's Veterans' Administration records.

"(f) The Administrator shall file, together with the answer to a complaint filed pursuant to subsection (a) of this section, a certified copy of the records upon which the findings of fact and decision complained of are based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court deems relevant to its consideration of the case.

"(g) In an action brought pursuant to subsection (a) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (f) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with section 4026 or 4027 of this title.

"(h) No action may be brought under this section as to which the initial claim for benefits is filed pursuant to section 3001(a) of this title after the last day of the fifth fiscal year beginning after the effective date of this section.

"§ 4026. Scope of review

"(a) In any action brought under section 4025 of this title, the reviewing court to the extent necessary to its decision and when presented, shall—

"(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions;

"(2) compel action of the Administrator unlawfully withheld; and

"(3) hold unlawful and set aside decisions, findings, and conclusions of the Administrator found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(D) without observance of procedure required by law.

If the reviewing court finds the Administrator's finding on an issue or issues of fact to be arbitrary, capricious, or an abuse of discretion, the court shall specify where it finds the record to be deficient and shall, prior to entering any judgment reversing such decision, remand the case a single time to the Administrator for further action not inconsistent with the court's order. In so remanding, the court shall specify a reasonable period within which the Administrator shall complete the required action and, if such action is not completed within the time specified by the court, the matter shall be returned to the court for its action.

"(b) In making the determinations under subsection (a) of this section, the court shall review the whole record before the court pursuant to section 4025(f) of this title or those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the reviewing court.

"(d) When a final decision of the Administrator (as defined in section 4025(c) of this title) is rendered in any case and such decision is adverse to a party solely because of the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4027. Remands

"In any action brought under section 4025 of this title, the reviewing court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (a) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within ninety days after the date of such remand, the matter shall be returned to the court for its action. At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator and, if either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator; in either case, the court may specify a reasonable period of time within which the Administrator shall complete the required action. After a case is remanded to the Administrator, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title with respect to the review of the original findings of fact and decision.

"§ 4028. Survival of actions

"Any action brought under section 4025 of this title shall survive, notwithstanding any change in the person occupying the Office of the Administrator or any vacancy in such office.

"§ 4029. Appellate review

"The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.".

(b) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part V are each amended by inserting after the item relating to chapter 71 the following new item:

"72. Judicial Review .... 4025".

SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting "except as provided for in chapter 72 of title 38" before the period at the end thereof.

TITLE IV—ATTORNEYS' FEES

SEC. 401. Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Administrator shall approve reasonable attorneys' fees to be paid by the claimant, to attorneys recognized under this section, for services rendered in representing an individual before the Veterans' Administration in connection with claims for benefits under laws administered by the Veterans' Administration. In no event shall such attorneys' fees exceed—

"(1) for any claim resolved before the claimant's receipt of a statement of the case pursuant to section 4005(d) of this title, $10; or

"(2) for any claim resolved following the claimant's receipt of such statement of the case, an amount in excess of the lesser of—

"(A) the fee agreed upon by the claimant and the attorney; or

"(B)(i) $500, or a greater amount specified in regulations prescribed by the Administrator based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee; or

"(ii) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 per centum of the total amount of any past-due benefits awarded on the basis of the claim.".

"(d) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and approve as part of its judgment a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the matter is resolved in a manner favorable to the claimant, the fee so determined and approved shall not exceed 25 per centum of the total amount of any past-due benefits awarded on the basis of the claim. If, in such an action, the matter is not resolved in a manner favorable to a claimant, the court may determine and approve as part of its judgment a reasonable fee, taking into consideration the extent to which there could have appeared to have been a reasonable probability of success for such an action at the time it was filed, for the representation of such claimant not in excess of $750.

"(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or by a court, the Administrator shall direct payment of any attorney's fee that has been determined and approved under this section out of such past-due benefits, but in no event shall the Administrator withhold any portion of benefits payable for a period subsequent to the date of the decision of the Administrator or court making such award.

"(f) The approval by the Administrator regarding attorneys' fees pursuant to subsection (c) of this section may be reviewed by a court only to determine whether the Administrator's action constituted an abuse of discretion. Review of the approval by either the Administrator or the court regarding an attorney's fee shall be obtained as follows:

"(1) For an award in conjunction with a claim before the Administrator pursuant to subsection (c) of this section, by an action brought, within thirty days after the date of notice of such award, by either the claimant or the attorney in the district court of the United States in the judicial district in which the claimant resides or the claimant's principal place of business is located.

"(2) For an award in conjunction with a claim approved by a United States court pursuant to subsection (d) of this section, on a motion made, within thirty days after the date of such award, by either the claimant or the attorney in the district court of the United States where the appeal was considered.

For actions brought under clause (1) of this subsection, the Administrator shall be named as the defendant, but notice of any such action shall also be given to all parties in interest and all such parties shall be heard by the court reviewing the award.

"(g) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are otherwise controlling.

"(h) For the purposes of subsections (c) and (d) of this section, claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(i) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the

Administrator, reasonable attorneys' fees and costs when the court finds that the position of the Administrator was not substantially justified or that special circumstances make an award just.".

Sec. 402. Section 3405 is amended by striking out "or" after "title," and striking out "him" and inserting in lieu thereof "such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title".

TITLE V—EFFECTIVE DATES

Sec. 501. This Act shall take effect on the first day of the first month beginning more than one hundred and eighty days after the date of the enactment of this Act.

Sec. 502. A civil action authorized in chapter 72 of title 38, United States Code, as added by section 302 of this Act, may be instituted to review decisions of the Board of Veterans' Appeals rendered on or after January 1, 1977, and before the effective date of this Act. Any such action must be instituted not later than one hundred and eighty days after the effective date of this Act or after the mailing of notice by the Administrator to the last known address of a claimant of the right to bring such a civil action, whichever occurs later.

SECTION BY SECTION ANALYSIS OF H.R. 1959, THE VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT

TITLE I--ADJUDICATIONS PROCEDURES

Section 101

Provides that an individual claiming a veterans' benefit has the burden of submitting evidence sufficient to justify a belief that the claim is well-grounded. The Veterans' Administration must assist the claimant in developing pertinent facts. Affords the benefits of the doubt to the claimant when there is an approximate balance between positive and negative evidence on the merits of an issue.

Section 102

Provides that subpenas of witnesses in matters within the jurisdiction of the Veterans' Administration may be served either by delivery of the subpena in person, or by registered or certified mail.

Section 103

Makes certain changes in title 38 of the U.S. Code aimed at the timely disposition of cases before the Board of Veterans' Appeals. Expands the Board from a maximum of 50 members (other than the Chairman and Vice-Chairman) to 65 members. Requires the Chairman to report to appropriate Congressional committees by October 1, 1983, and annually thereafter, on the activities of the Board during the previous fiscal year, and on projected activities for the current and following fiscal year. Requires the annual report to include specific information on the caseload of the Board, and to provide an evaluation of the ability of the Board, given the existing and projected personnel levels, to dispose of cases in a timely manner.

Section 104

Redesignates "associate member" of the Board of Veterans' Appeals as "member."

Section 105

Provides that the claimant be made aware of, and be given the opportunity to be heard concerning any new information made available to the Board of Veterans' Appeals by the Armed Service Department concerned, on the basis of which the Board could issue a conclusion contrary to its initial determination on a claim.

Section 106

Provides certain statutory protections for persons appealing a decision on a claim by the Veterans' Administration. Provides that the claimant be afforded an opportunity for a hearing prior to a final decision by the Board of Veterans' Appeals, and that the Board's decision be based solely on the evidence, material of record in the proceeding and on applicable law. Authorizes the Board to reopen a claim it previously disallowed on the basis of any new and material evidence, even in cases that a disallowance had been upheld after judicial review. Requires the Board to promptly mail to the claimant notice of its decision, which must include a statement of the Board's findings and conclusions as well as the order granting or denying relief.

Section 107

Strikes provision of current law requiring the Board of Veterans' Appeals to base its decision on the entire record.

Section 108

Requires the Board of Veterans' Appeals to arrange for an advisory medical opinion when two physicians substantially disagree on an issue pertinent to a case, if the opinion is requested by the claimant, and after the Board has taken appropriate action to attempt to resolve the disagreement. If the Board denies the claimant's request for an advisory medical opinion, it must provide its reasons for such a denial. The Board's decision in this regard is final, and not subject to judicial review.

Section 109

Establishes new sections of veterans' law concerning adjudication of veterans claims to benefits. Authorizes the Administrator of Veterans' Affairs to administer oaths, examine witnesses and receive evidence--including any evidence that might be inadmissible in judicial proceedings--in connection with the consideration of a claim to benefits. Sets forth certain rights of a claimant or of his or her representative appearing before the Board of Veterans' Appeals to: examine case files; present witnesses and evidence; make oral arguments and submit briefs; present medical opinions; and serve written interrogatories. Authorizes persons to whom interrogatories are served to file an objection, and requires the Administrator to evaluate the objection and issue an order directing the question to be answered as served or after modification, or directing that the question not be answered. Authorizes the Administrator to subpena a person to appear at a deposition to respond to an interrogatory, if there is no response to the interrogatory within 30 days. Provides for the disqualification of a

Veterans' Administration employee from considering a claim on grounds of personal bias or some other cause. Provides access of all parties to the record of a case before the Board, including access to transcripts or recording of testimony. Provides that adjudication and hearing procedures prescribed in title 38 of the U.S. Code and in regulations issued pursuant to that title are exclusive with respect to hearings, investigations and other proceedings connected to claims for Veterans' Administration benefits.

When a claim to veterans benefits is denied, requires the Administrator of Veterans' Affairs to apprise the claimant and the claimant's authorized representative of the claimant's procedural rights through written notice at each stage relating to the disposition of the claim.

Section 110

Requires the Administrator, within a year after the enactment of the legislation, to conduct a two to three year study of alternative methods for the resolution of a claim for which a notice of disagreement had been filed. The two alternative methods to be studied are: (1) an intermediate-level adjudication process under which a hearing is held on the claim at the agency of original jurisdiction before a panel of three Veterans' Administration employees who render a decision and prepare a new statement of the case; and (2) an enhanced schedule of visits by a panel or panels of the Board of Veterans' Appeals to conduct formal, recorded Board hearings. Requires the Administrator to issue a report to Congress on the results of the study including the relative costs of the two approaches, the impact on the workload of the regional offices and on the caseload of the Board of Veterans' Appeals, and recommendations for administrative and legislative actions as may be indicated by the study.

TITLE II--VETERANS' ADMINISTRATION RULE MAKING

Section 201

Subjects the Veterans' Administration rule making to the requirements of the Administrative Procedures Act (5 U.S.C. 553).

TITLE III--JUDICIAL REVIEW

Section 301

Makes technical amendments to section 211(a) of title 38 concerning the finality of decisions by the Administrator of Veterans' Affairs to accommodate the new provisions authorizing judicial review of claims to veterans' benefits which are established by the legislation.

Section 302

Adds a new chapter 72 to title 38 authorizing judicial review of claims to veterans' benefits. Authorizes claimant to obtain a review by a U.S. district court of an adverse ruling on most claims to veterans benefits (exceptions are life insurance claims under chapter 19, and claims to housing and small business loans under chapter 37 of title 38) within 180 days after receipt of a determination from the Board of Veterans' Appeals or a dismissal of an appeal by the Board. Limits judicial review only to claims originally filed up to the last day of the fifth fiscal year after the effective date of the legislation.

Empowers the court to enter a judgment or remand the cause. Requires the reviewing court to: (1) decide all relevant questions of law and regulations; (2) compel actions unlawfully withheld by the Administrator of Veterans' Affairs; (3) hold unlawful and set aside decisions by the Administrator found to be arbitrary, contrary to constitutional right, power privilege or immunity, in excess of statutory authority, or without observance of a procedure required by law.

Upon finding the Administrator's actions were arbitrary, capricious or an abuse of power, prior to entering a judgment reversing the decision the court must remand the case to the Administrator.

Mandates that, at the request of the Administrator, filed prior to the time specified for the Administrator to file his answer, a single remand of a case for review by the Administrator will be permitted. If the Administrator does not complete the review within 90 days the case is returned to the court. After the Administrator files his answer, the court may remand the case to the Administrator for further action. After the remand, and any further action required of the Administrator, requires the Administrator to modify, supplement, affirm or reverse original findings on a case, and file the decisions with the court for its review. The decisions of the U.S. district court pursuant to the chapter are subject to appellate review in the same manner as other civil actions.

Section 303

Makes technical amendment to 28 U.S.C. 1346(d) which precludes the jurisdiction of U.S. district courts in civil actions involving claims for a pension to except the judicial review of veterans' benefit claims as authorized by the new chapter 72 of title 38.

TITLE IV--ATTORNEYS FEES

Section 401

Authorizes the Administrator of Veterans' Affairs to approve fees for attorneys representing persons claiming veterans' benefits. Limits attorneys fees to $10 for representation involving a claim resolved before a statement of case is received; and for a claim resolved thereafter, $500 or a greater amount set by regulation or approved by the Administrator; or if the attorney has agreed to payment only upon a favorable decision on the claim, 25 percent of any total past-due veterans' benefits awarded.

Authorizes the U.S. district court to determine reasonable fees for attorneys representing claimants receiving a favorable action after judicial review. In cases in which there was an agreement that the attorney would receive payment only upon the favorable outcome of a judicial review, the attorney's fee is limited to 25 percent of any total past-due benefits awarded to the claimant. If there is not a favorable outcome to the case, the court may approve a fee for the attorney, not to exceed $750. Authorizes the Administrator to withhold a portion of past-due benefits only for attorneys' fees approved under the section. Authorizes the review by a U.S. district court of a decision on an attorney's fee, either by the Administrator or by the court.

Section 402

Subjects persons intending to defraud, deceive, mislead or threaten a claimant to or beneficiary of veterans benefits to criminal penalties.

TITLE V--EFFECTIVE DATES

Section 501

Establishes the effective date of the legislation as the first day of the first month beginning 180 days after the enactment.

Section 502

Authorizes judicial review of decisions of the Board of Veterans' Appeals rendered between January 1, 1977 and the effective date of the Act if the action is instituted not later than 180 days after either the effective date of the Act, or the mailing of a notice by the Veterans' Administration advising the claimant of the right to a judicial review of a decision, whichever is earlier.

Testimony of Senator Alan Cranston
Ranking Minority Member
Senate Committee on Veterans' Affairs
before the
Subcommittee on Oversight and Investigation
Committee on Veterans' Affairs
House of Representatives

July 21, 1983

As a strong, long-time supporter of legislation to provide for judicial review of VA decisions denying claims for benefits, I am delighted to appear before this Subcommittee this morning to express my support for that legislation.

Mr. Chairman, I congratulate you for scheduling this hearing and want to thank you very much for this opportunity to testify before you.

During this Subcommittee's oversight hearings on the VA judicial review issue during the 96th Congress, I submitted an extended statement in which I set forth in some detail the reasons for my support for judicial review legislation. Because that statement is included in the printed record of that hearing -- beginning on page 309 -- I will not repeat the material in that statement. Rather, I will discuss briefly a few, selected points that I believe should be addressed in any consideration of providing judicial review for VA decisions.

Before I begin that discussion, let me quickly update the record regarding the Senate bills that have moved forward in this area since the time of my earlier testimony. At that time, S. 330 had been passed by the Senate and was pending in the House. In the next Congress, the legislation introduced on this subject in the Senate was S. 349. The Senate Committee on Veterans' Affairs again held a hearing and in June of last year reported the measure with some further amendments designed to reflect more directly the Committee's intention with respect to attorneys' fees and the appropriate scope of judicial review. This measure was passed by the Senate last September. In this Congress, the provisions of that measure were reintroduced in S. 636. The Veterans' Affairs Committee reported this bill on May 18 with minor amendments, and it was passed by the Senate on June 15.

A Matter of Fairness to Veterans

The starting point for discussion about the need for VA judicial review legislation often involves proponents being asked to demonstrate the problems with the current system that need to be remedied through the judicial route. Although I am fully able to respond to the issue when it is posed in this way -- and I will mention some points in that regard in a few minutes -- I do not believe finding fault with the current system is a necessary step in making the case for judicial review. Rather, I believe the appropriate first question is whether there is any continuing reason -- putting to one side the question of whether there ever was a valid reason -- for denying veterans the same right of access to court review of VA benefits decisions that is available in the case of virtually every other federal benefit. Certainly there are some restrictions in current law on access to judicial review of certain federal agency actions but only one area -- federal employee workers' compensation benefits -- is at all analogous to VA benefits. Even though there are some differences that might justify the limitation on court review of federal workers' compensation cases, I am not satisfied that it is an appropriate restriction in that area either. In any event, that issue is not one that the Veterans' Affairs Committees have any jurisdiction to address.

When the issue is posed this way -- why should veterans be denied rights available to others in their dealings with the Federal Government -- I have never heard a satisfactory answer justifying maintaining the current-law preclusion. I realize that concerns have been expressed that judicial review would have an undue impact on the agency's current claims adjudication processes. I have also heard concerns that providing for judicial review would make the VA claims process more adversarial, would create unnecessary delay, and would cost veterans money in the form of attorneys' fees. Although I fully recognize the genuineness of these concerns, I do not believe they are well-founded.

It is possible that providing for judicial review and doing nothing else could have an untoward effect on the current VA system. However, the legislation that has been developed in the Senate contains numerous provisions that have been designed expressly to avoid that result. These provisions in S. 636 would ensure that, to the extent feasible, the VA's current, desirable adjudication practices and procedures would be protected by providing a statutory basis for them. In this way, not only would current processes be protected in the event of judicial review, but they would actually be strengthened by being set out in law rather than being based on regulations or, in some cases, on no more than informal past practice.

With reference to the concerns about judicial review causing undue delay or about it somehow making the veteran and the agency adversaries, it is important to remember that under S. 636 judicial review would be available only after a veteran's claim has been turned down by the Regional Office, and, on appeal, by the Board of Veterans' Appeals. At that point, it is difficult to see how providing for judicial review could create any delay. The VA proceedings would have run their normal course. A process no longer going anywhere can't be delayed. Moreover, a veteran whose claim has been finally denied upon appeal would not become an adversary of the VA by virtue of having court review available. Once the claim is finally denied, a dispute clearly exists. Courts don't create adversarial situations; they resolve them.

Regarding attorneys' fees, to me it's almost incomprehensible that the current law limit of $10 on the amount that an attorney can be paid has survived to this time. Whatever behavior characterized the legal profession at the time the original limitation was enacted following the Civil War, it is no longer credible to insist that attorneys would prey on innocent veterans. I also am unable to accept the view that veterans as a class are so unable to protect themselves that there needs to be a barrier erected in law between them and attorneys. Let me be clear -- I do not believe that most veterans with claims before the VA should be advised to seek the assistance of an attorney. Certainly my first advice to a veteran with such a claim is to contact a veterans service officer. But the existence of that superb resource is not a reason for totally precluding a veteran from seeking to obtain the services of an attorney if the veteran so wishes. On this point, I note that S. 636 as passed by the Senate would not lift the $10 limit in a particular case until after the veteran has received an initial BVA decision.

I want to address one final point that is sometimes mentioned as a reason for continuing the bar to judicial review -- the impact of a new class of claimants on the federal judiciary. Without detailing the various arguments on this point -- and there have been widely differing views on this point expressed before our Committee -- I do not understand why veterans and others with claims before the VA should continue to be discriminated against and denied important rights because treating them fairly might enlarge the responsibilities of the court system. If the Federal court system is overburdened, the Congress should address that problem on an equitable basis by expanding available resources or limiting access to court on some basis that applies to all citizens. It is blatantly unfair and arbitrary to deal with perceived problems in the courts by singling out veterans for exclusion with respect to benefits earned by service in the military.

Continuing Need

In the statement I submitted to the Subcommittee in 1980, I discussed reasons why I believed that there was a need for judicial review legislation. I believe the general reasons I outlined then -- ensuring fairness to individual claimants and providing a basis for the review of questionable actions restricting VA benefits -- continue to be valid. I am particularly concerned with reference to the need to provide veterans affected by general agency decisions and practices restricting, withholding, or withdrawing VA benefits -- actions that seem to be increasing in frequency as pressure continues in the Executive Branch to realize cost savings in current programs -- with a basis to challenge such actions. There have been numerous examples of such actions in the recent past -- actions by the agency to restrict access to health care in the case of military retirees; attempts by the VA, at the direction of the Office of Management and Budget, to restrict beneficiary travel reimbursement to eligible veterans; allegations that some VA stations are applying overly stringent standards in cases in which Vietnam veterans are seeking to be granted service connection for post-traumatic stress disorder; efforts by the VA to collect for the cost of health care provided to veterans who happen to be VA employees; and the VA's drawing overly restrictive regulations to implement the targeted GI bill delimiting date extension enacted in Public Law 97-72 as well as the radiation-exposure health-care eligibility authority enacted in that same Public Law.

In each of these cases and in other similar cases, the lack of access to court review has serious implications. Our two Committees do their utmost to oversee the activities of the VA. But the limited resources of our committees do not allow for thorough review of and congressional action to resolve satisfactorily all of the issues arising in such a large and complex agency. In addition, I do not believe that aggrieved veterans should have to be dependent for relief on congressional committee processes which, for all their virtues, cannot be fairly said to be designed to achieve or to be capable of systematically achieving the evenhanded dispensation of justice in these situations. We are legislative bodies. We cannot effectively be the courts of last resort.

However, if the veterans affected by various VA actions had access to court to challenge agency actions, the individuals most directly affected by these actions would be guaranteed the opportunity to be heard by an entity outside of the VA and to obtain relief in appropriate cases.

In making this point, I do not want to be understood as suggesting that the VA is wrong on all or any of the issues I have noted, although I have stated my strong disagreement with the agency's actions in a number of these areas. Rather, I am suggesting that outside review by the independent branch of Government established in our constitutional framework with the special responsibility of determining whether governmental action is lawful and fundamentally fair would benefit all parties involved. The VA would have its processes subjected to appropriate scrutiny and, when the agency's actions were upheld, it would be vindicated. Likewise, to the extent that the agency's actions were held unlawful or fundamentally unfair, remedial steps could be taken to insure that the agency is meeting its responsibilities fully.

I am concerned that agency action that does not have the benefit of outside scrutiny may fail, over the long haul, to address fully the legitimate needs of those the agency exists to serve. Providing for judicial review would be most valuable in helping to ensure the desired result.

As a final point on this issue of providing for review of general agency action, the VA recently testified to our Committee that there is no need for legislation in this area because of a general trend in court decisions permitting veterans to challenge VA regulations. I do not agree with this analysis for two important reasons. First, the court decisions on this point have varied from one court of appeals to another. A clear legislative provision -- as in S. 636 -- would eliminate any confusion and any difference in result. Second, despite the VA's acknowledgement that some courts of appeals clearly have allowed veterans to bring actions challenging VA regulations on other than constitutional grounds, the United States Government continues to raise the title 38 statutory bar to judicial review in VA cases not involving individual claims for benefits. Again, a clear statutory basis for judicial review would end this confusion.

The last matter that I want to touch on briefly involves the appropriate scope of review that a court would apply in the review of a VA fact decision. This issue has been a matter of long and involved discussion in our Committee, and I will not attempt to go over all that background. Rather, the one point I want to stress on this issue is my belief that it is vital that whatever scope of review is chosen must provide some basis for court review of questions of fact. The legislation passed by the Senate this year -- and during the last Congress as well -- includes a very narrow scope of review of factual issues. Providing such a very narrow basis on which a court could review a decision by the BVA on a question of fact reaffirms the BVA's role as the expert final arbiter of such questions. However, by refusing to limit the review strictly to questions of law and thus preclude all review of questions of fact -- an approach that some have advocated -- S. 636 affords an opportunity to correct truly egregious decisions on fact questions. Although I believe that such decisions are rare, I do not believe that total preclusion of review of facts would be appropriate or productive.

Again, please accept my thanks for the opportunity to appear before you on this important issue. I look forward to continuing to work with the Chairman and all the members of the Committee on this and other matters.

U.S. Senator
GARY HART
Colorado

July 21, 1983

Contact: Beth Smith
(202) 224-5852

TESTIMONY BY SENATOR GARY HART SUBMITTED TO THE HOUSE VETERANS AFFAIRS COMMITTEE RE: PENDING LEGISLATION TO GRANT JUDICIAL REVIEW OF VETERANS ADMINISTRATION BENEFIT DECISIONS AND OTHER MATTERS

Mr. Chairman, I would like to thank you and the other members of the House Veterans Affairs Committee for scheduling these hearings to examine the concept of judicial review of Veterans Administration benefit decisions and other essential improvements in the administrative procedures of the VA.

I appreciate the opportunity to submit testimony in support of H.R. 2936, as amended by the Senate, and other similar legislation now under consideration by this Committee which will allow for judicial review of VA decisions.

Mr. Chairman, I have long been a proponent of reform of the adjudication procedures of the Veterans Administration. In May of 1976, I first introduced legislation to open the VA to judicial review. Since that time I have persisted in my efforts to ensure that the American veteran be afforded all his or her constitutional rights to the due process of law in dealings with the Veterans Administration. I first became involved with this effort at the urging of Colorado Vietnam veterans who felt that the denial of the right to judicial review relegated veterans to the status of second-class citizens. These Vietnam veterans could not understand why they were denied the right to court review of their claims, if denied by the VA, when almost every other Federal bureaucratic action affecting any corporation, welfare recipients, Social Security recipient and prisoner is afforded judicial review by the Federal courts.

Mr. Chairman, as you know, the United States Senate has passed in the 96th, 97th, and in the 98th Congresses legislation that will reform the Veterans Administration adjudication procedures and grant judicial review of those decisions. I am proud to have been the principal sponsor of those bills and I am grateful for the support that these bills have received from my Senate colleagues like Senator Cranston and Senator Simpson, Chairman of the Senate Veterans Affairs Committee.

Mr. Chairman, H.R. 2936, which was amended in the Senate to reflect the text of S. 636, passed the Senate on June 15, 1983. The intent of H.R. 2936, as amended, is to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration.

Mr. Chairman, it is time for this Committee and the members of the United States House of Representatives to follow the Senate in finally lifting the preclusion to judicial review of certain VA benefit decisions.

Mr. Chairman, the central issue in the debate on this legislation is whether we are going to afford the American veteran the same constitutional rights we grant other citizens in this country. Judicial review is important in granting the veteran adequate protection of his or her rigths as a citizen, and it will provide improved oversight of VA procedures and activities by an independent body.

MORE

It is important to note that H.R. 2936 will not diminish in any way the important role played by the veterans service organizations in their efforts to assist claimants before the VA. The veterans service officers, which presently provide highly effective, free service to veterans, will continue assisting veterans in the filing of initial claims with the agency.

The $10.00 limitation for payment of attorneys who represent veterans in making original claims before the local VA rating board and the initial decision of the Board of Veterans Appeals. Clearly, veterans will continue to use the services provided by the national veterans service offices or VA benefit counselors in the initial stages of the VA claim and appeal procedures. If the veterans' claim is rejected by the Board of Veterans Appeals, he or she may want to secure the services of an attorney to develop evidence and to prepare an appeal for reconsideration by the Board of Veterans Appeals or to seek relief in the Federal courts.

Mr. Chairman, it is becoming increasingly more evident that the preclusion of judicial review of VA decisions and the denial of reasonable attorney fees is based on outmoded assumptions. The Federal courts have been moving in the direction of expanding their jurisdiction over VA actions which were formally precluded from judicial review.

For example, in JOHNSON vs. ROBINSON, the Supreme Court held that section 211(a) Title 38 U.S.C. (precluding judicial review) cannot be construed to deny justice to those who challenge the constitutionality of statutes providing veterans benefits.

In 1970, the Supreme Court held in GOLDBERG vs. KELLY that recipients of welfare had a property right to their payments. Welfare was held to be not just a mere "gratuity" but a statutory entitlement. This decision established that welfare recipients have more right to their benefits than veterans.

In the case of WAYNE STATE UNIVERSITY vs. MAX CLELAND, et. al., the Sixth Circuit Court of Appeals held that section 211(a) is not a bar to judicial review of the constitutionality of rules and regulations promulgated by the Administrator of Veterans Affairs or his authority to promulgate regulations.

Mr. Chairman, the trend of the Federal judiciary in a number of key decisions is clearly toward more protection of the due process rights of veterans. It is the responsibility of Congress to take action now to restructure the current VA adjudication procedures as outlined in H.R. 2936, not only to ensure that veterans' rights are protected in the process but also to protect the agency from the potential of court imposed reforms that may overburden the agency with additional procedures.

Mr. Chairman, H.R. 2936 will bring the Veterans Administration procedures in compliance with these recent Federal court decisions and will grant our veterans, many of whom feel betrayed, their full measure of constitutional rights for which they served this nation.

The fundamental issue in this legislation is simple justice for our veterans. To deny any citizen access to an attorney, to isolate a Federal agency from judicial review and deny judicial oversight of the rules and regulations promulgated by a Federal agency goes against the very principles of our constitutional system.

I strongly urge the members of this Committee to support this legislation. I appreciate the opportunity to submit this testimony today.

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JUDICIAL REVIEW OF VETERANS CLAIMS

TESTIMONY OF

THE HONORABLE JOHN J. LAFALCE

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON
VETERANS' AFFAIRS

JULY 21, 1983

MR. CHAIRMAN,

THANK YOU FOR INVITING ME TO TESTIFY THIS MORNING BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS ON THE ISSUE OF JUDICIAL REVIEW OF VETERANS CLAIMS.

MR. CHAIRMAN, EVERY AMERICAN WHO BELIEVES THAT HE OR SHE HAS BEEN UNFAIRLY JUDGED BY A COURT OF LAW OR BY A FEDERAL ADMINISTRATIVE AGENCY IS ENTITLED TO JUDICIAL REVIEW OF THE COURT ORDER OR ADMINISTRATIVE DECISION. EVERY AMERICAN EXCEPT VETERANS DEALING — WITH THE VETERANS ADMINISTRATION (VA).

VETERANS, AMERICANS WHO HAVE FOUGHT AND SERVED TO PROTECT AND DEFEND THE CONSTITUTION, ARE DENIED THE BASIC CONSTITUTIONAL RIGHT OF DUE PROCESS OF LAW WHEN DEALING WITH THE VA.

I INTRODUCED A BILL DURING THE 97TH CONGRESS--H.R. 1331--TO CORRECT THIS GLARING INEQUITY, AND REINTRODUCED IT AGAIN DURING THE 98TH CONGRESS--H.R. 3300--IN EACH INSTANCE, BOTH FOR MYSELF AND FOR THE VIETNAM-ERA VETERANS IN CONGRESS CAUCUS (VVIC).

I would also like to recognize the efforts of our colleague from California--Mr. Edwards, a member of this subcommittee--who has introduced similar legislation--H.R. 1959--to provide for judicial review of VA claims decisions. I welcome his leadership on this matter.

Our bills are designed to redress a grevious wrong that has been perpetrated on veterans for the past fifty years. Veterans who believe that the VA has wrongfully or illegally denied them the disability compensation which they earned, and to which they are entitled by law, are denied the right to appeal their cases to a fair and impartial court of law.

Mr. Chairman, when individuals are angered by a court decision or an administrative order, we often hear the retort "I am going to fight this all the way to the Supreme Court." Now we know that the Supreme Court hears few cases a year, and that the probability of it hearing any given case is remote. But, the ability to appeal to a higher authority--in this case the highest court in the land--is a fundamental right that all Americans enjoy. It carries with it not only a procedural safeguard against the abuse of judicial and administrative power, but also a symbolic value that is fundamental to the definition of our democracy.

Veterans who feel that they have been unjustly denied compensation benefits enjoy no such safeguard. They enjoy no such symbolic reward. For the veteran, there is no right to appeal VA determinations "all the way to the Supreme Court."

INDEED, THERE IS NO RIGHT TO APPEAL VA DECISIONS TO ANY COURT!

VETERANS ARE ALSO EFFECTIVELY DENIED THE RIGHT TO HIRE AN ATTORNEY TO REPRESENT THEM IN THEIR CASES BEFORE THE VA'S COMPENSATION BUREAUCRACY. PRESENT LAW MAKES IT A CRIME FOR AN ATTORNEY TO CHARGE A VETERAN MORE THAN $10 FOR TOTAL SERVICES RENDERED IN A VETERAN'S CASE. I WOULD LIKE TO ASK THE MEMBERS OF THIS SUBCOMMITTEE WHO ARE LAWYERS AND WHO PRACTICED LAW BEFORE BEING ELECTED TO CONGRESS HOW MANY CASES THEY HANDLED FOR $10. I WOULD LIKE TO, BUT I DON'T HAVE TO, FOR THE NUMBER IS SMALL INDEED. THE COSTS OF PREPARING SUCH A CLAIM WOULD FAR EXCEED $10, FRIGHTENING AWAY ALL BUT THE MOST ALTRUISTIC AMONG US.

VETERANS ARE ALSO DENIED THE PROTECTION OF THE ADMINISTRATIVE PROCEDURES ACT (APA). THIS LAW, ENACTED IN 1946, WAS DESIGNED TO PROTECT THE RIGHTS OF AMERICANS FROM BEING VIOLATED BY AGENCIES OF THE FEDERAL GOVERNMENT. AS THE GOVERNMENT HAS GROWN, THE NEED FOR THESE PROTECTIONS HAS GROWN. EVERY MEMBER OF THIS BODY PLAYS AN OMBUDSMANS ROLE FOR HIS CONSTITUENTS. WE LOOK AFTER SOCIAL SECURITY CHECKS THAT ARE NOT DELIVERED, WE HELP OUR CONSTITUENTS AND THEIR FAMILIEIS IN FOREIGN COUNTRIES WITH IMMIGRATION MATTERS, WE TRACK DOWN REFUND CHECKS FROM THE IRS, AND WE MAKE SURE MEDICARE BENEFITS ARE PROMPTLY PAID. BUT MOST OF ALL, IT IS OUR DUTY TO BE SURE THAT OUR CONSTITUENTS ARE AFFORDED EVERY AVAILABLE SAFEGUARD WHEN DEALING THE FEDERAL BUREACRACY.

IN THIS REGARD, MR. CHAIRMAN, WE HAVE FAILED OUR VETERANS WHO are, by law, denied these basic protections.

I am here today to tell this subcommittee that it is time to change our ways. It is time to bring veterans under the broad umbrella of constitutional and statutory protections that shield every other American from the arbitrary and capricious decisions of the federal bureaucracy.

The House of Representatives has been remiss in this regard. On several occasions, our colleagues in the Senate have passed veterans judicial review legislation, but we have failed to follow their lead. Most recently, the Senate, on June 15, 1983, passed Senator Gary Hart's (D-CO) judicial review bill--S. 636--as a substitute for a House-passed bill--H.R. 2936--that would expand the size of the VA's Board of Veterans Appeals (BVA). We now have an opportunity to accept the Senate-passed measure or consider bills that have been introduced in the House.

Before outlining my own bill--H.R. 3300--let me say that if the Veterans' Committee were to accept the Senate-passed language in conference, I would be delighted to support your efforts. My bill, and that introduced by Rep. Edwards are worthy substitutes. But in this instance, the need to act far outweighs pride of authorship.

Nonetheless, H.R. 3300, does contain several provisions that should be included in veterans judicial review legislation:

INCLUDING PROVISIONS TO:

-CODIFY, FOR VA ADJUDICATION PURPOSES, THE BURDEN OF PROOF AND REASONABLE DOUBT STANDARD CURRENTLY PROVIDED FOR BY VA REGULATION,

-ESTABLISH THAT IF AN APPROXIMATE BALANCE OF POSITIVE AND NEGATIVE EVIDENCE EXISTS REGARDING THE MERITS OF A CLAIM, THE VA IS TO RESOLVE SUCH DOUBT IN FAVOR OF THE CLAIMANT

-INCREASE THE SIZE OF THE BOARD OF VETERANS APPEALS FROM 50 TO 65 MEMBERS,

-REQUIRE THAT THE BOARD PROVIDE NOTICE TO A CLAIMANT AND AN OPPORTUNITY FOR A REHEARING BEFORE A DECISION MAY BE BASED ON NEW EVIDENCE,

-REMOVE THE CURRENT REQUIREMENT THAT NEW MATERIAL THAT WOULD ALLOW THE BOARD TO REOPEN A PREVIOUSLY DENIED CLAIM BE IN THE FORM OF OFFICIAL REPORTS, AND

-ESTABLISH NEW PROCEDURAL RULES FOR ADJUDICATION HEARINGS REGARDING ADMISSABILITY OF EVIDENCE, PROCEDURAL RIGHTS OF CLAIMANTS, AND THE RIGHT OF A CLAIMANT TO OBTAIN AND EXAMINE A COPY OF THE HEARING RECORD.

THESE ARE IMPORTANT PROVISIONS, MR. CHAIRMAN, AND THEY SHOULD BE INCLUDED IN LEGISLATION ADOPTED BY THE VETERANS COMMITTEE AND THE HOUSE. BUT THERE ARE ALSO PROVISIONS OF H.R. 3300 THAT MUST BE INCLUDED IN ANY SUCH LEGISLATION.

FIRST, THE VA'S RULEMAKING PROCEDURES MUST BE INCLUDED UNDER

THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT.

SECOND, ALLOWABLE ATTORNEY'S FEES MUST BE REASONABLE SO THAT VETERANS CAN BE FULLY REPRESENTED BY LEGAL COUNSEL BEFORE THE VA. I DO NOT WISH TO DOWNGRADE THE QUALITY OR THE VALUE OF THE SERVICE PERFORMED BY VETERANS ORGANIZATIONS IN PROVIDING TECHNICAL ASSISTANCE TO VETERANS. THIS FREE SERVICE IS INVALUABLE IN STEPPING THE VETERAN THROUGH THE VA'S BUREAUCRATIC MAZE. BUT IT IS NOT LEGAL COUNSEL. IF WE ARE TO GIVE VETERANS ACCESS TO THE COURTS, AND I BELIEVE WE MUST, WE MUST INCREASE THE $10 DOLLAR LIMITATION ON LEGAL FEES. H.R. 3300 RAISES THE LIMIT TO $500 AND ALLOWS FOR ADDITIONAL FEES IN EXTRAORDINARY CASES.

FINALLY, AND AT THE VERY HEART OF THE MATTER, H.R. 3300 PROVIDES FOR JUDICIAL REVIEW OF VA DECISIONS IN THE FEDERAL COURT SYSTEM.

JUDICIAL REVIEW PROVIDED FOR IN THE BILL IS NEITHER UNLIMITED NOR UNBRIDLED. JUDICIAL REVIEW OF A FINAL DECISION MUST BE SOUGHT WITHIN 180 DAYS OF THE VETERANS APPEALS BOARD'S MAILING OF NOTICE OF ITS DECISION. MY BILL PROVIDES THAT THE COURT MAY DECIDE QUESTIONS OF LAW AND INTERPRET CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS, BUT THAT QUESTIONS OF FACT WILL NOT BE SUBJECT TO A TRIAL DE NOVO.

THESE ARE NOT ONLY REASONABLE LIMITATIONS, BUT THEY ARE CONSISTENT WITH THE RIGHTS AND PRIVILEGES ENJOYED BY ALL OTHER AMERICANS

WHEN APPEALING ADMINISTRATIVE DECISIONS TO THE COURTS.

MR. CHAIRMAN, I WOULD LIKE TO CLOSE MY TESTIMONY BY NOTING THAT ADVOCATES OF JUDICIAL REVIEW OF VETERANS CLAIMS DECISIONS DO NOT VIEW THE VA AS AN ADVERSARY. WE ARE COGNIZANT OF THE VA'S ATTEMPTS TO PROVIDE A NONCONFRONTATIONAL FORUM TO RESOLVE DISPUTES, AND THE VA'S PRONOUNCED POLICY OF "BENDING OVER BACKWARDS" TO MEET LEGITIMATE CLAIMS. BUT ANYONE WHO LENDS AN EAR TO VETERANS WHO BELIEVE THAT THEY HAVE BEEN WRONGLY JUDGED BY THE VA KNOWS THAT EVEN THE VA MAKES MISTAKES.

VETERANS MUST BE AFFORDED THE OPPORTUNITY, THE RIGHT, TO HAVE THEIR GRIEVANCES AIRED IN A COURT OF LAW. WE HAVE TAKEN THIS RIGHT AWAY FROM THOSE WHO HAVE FOUGHT AND SERVED TO PROTECT THE CONSTITUTION OF THE UNITED STATES, AND WE HAVE ALLOWED THIS INJUSTICE TO PREVAIL FOR FAR TOO LONG.

I HOPE THAT TODAY'S HEARINGS WILL PROVIDE THE IMPETUS THAT IS NEEDED TO EXTEND THE CONSTITUTIONAL PROTECTION OF DUE PROCESS OF LAW TO AMERICA'S VETERANS. IF WE DO NOT FULLY RESTORE THE CONSTITUTIONAL RIGHTS OF THOSE SERVE, HOW CAN WE EXPECT, HOW CAN WE ASK, THOSE WHO SERVE TO PROTECT THE CONSTITUTION.

IT IS TIME TO FULFILL OUR PART OF THE BARGAIN. I HOPE THAT THIS SUBCOMMITTEE AND ITS PARENT COMMITTEE GIVE US THAT OPPORTUNITY.

THANK YOU.

Department of Justice

STATEMENT

OF

CAROLYN B. KUHL
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

JUDICIAL REVIEW OF VETERANS' CLAIMS

ON

JULY 21, 1983

Mr. Chairman, I appreciate very much the opportunity to appear before this subcommittee to present the views of the Justice Department on proposals to create a right of judicial review for veterans' benefits.

The Justice Department has been involved in the debate over the question of establishing a right of judicial review over veterans' benefits for several years. We are concerned with insuring the fairness of our government benefit programs. Indeed, this concern, combined with our concern over the impact of proposals to create a new right of judicial review on the functioning of the federal courts, leads us to oppose proposals for judicial review of veterans' benefits decisions. We believe that, ultimately, the interests of veterans are not served by superimposing on the present system a right to appeal to our now tremendously overcrowded courts. Appeal to the courts is not the only or the simplest way to insure justice. Rather, a carefully designed administrative system can preserve and protect all the rights provided by law to our veterans.

We will not, in this statement, address at length the fairness of the present administrative system. This is a subject better addressed by the Veterans Administration. We note, however, that in the discussion of this issue over the years no one has alleged that the present system results in widespread injustice. The Senate Committee Report to a predecessor bill, S. 330 in the 96th Congress, noted:

> "The decision to introduce S. 330 in the 96th Congress and to continue committee consideration of judicial review legislation was not based on a belief that the current system, resulting in a final, unappealable decision being made by the Board of Veterans' Appeals, results in wide-spread injustices; to the contrary, there is no evidence that most claimants are not satisfied with the resolution of their claims for VA benefits." (Senate Rpt. #96-178, 96th Congress, 1st Session, May 15, 1979, pp. 23-24.)

Judicial review of veterans' benefits decisions has been precluded since 1933. Act of March 23, 1933, Ch. 3, 9 Stat 48. Congress has repeatedly re-enacted the limitation on judicial review. It has, indeed, broadened the original language in response to attempts by the court to narrow this restriction on their review of veterans' benefits decisions. For example, in 1970 Congress broadened the restriction reaffirming the reasoning behind it. See PL 91-376, H Rpt. #91- 1166, 91st Congress, 2nd Session, 1970 U.S. Code Congressional and Administrative News, 3723, 3729, 3739.

This preclusion of judicial review has historically been supported by two policy arguments which continue to be valid. As articulated by the U.S. Supreme Court in Johnson v. Robison, 415 U.S. 361, 370 (1974), these policies are: "First, to insure that veterans' benefits claims will not burden the courts and the Veterans Administration with expensive and time-consuming litigation. Secondly, to insure that the technical and complex determinations of Veterans Administration policy connected with veterans' benefits decisions will be adequately and uniformly made." To these reasons might be added the desire to prevent the present informal, nonadversarial procedures weighted in favor of the claimant from becoming excessively formal, more adversarial and more expensive for both the claimant and the veterans' program budget.

The first reason offered in support of this restriction is, if anything, now more important. As the courts become increasingly overloaded, the delivery of justice becomes slower and the quality of the decision-making process declines.

Annual filings in the district courts have increased from 168,789 in 1980[1] to 233,065 for 1983.[2] Similarly, filings in the courts of appeals have increased from 23,200 in 1980[3] to 27,946 in 1982.[4]

The case load burden has led to assembly-line procedures for disposing of cases. It has not allowed enough time for reflection or mastery of records. In 1975 Circuit Judge Duniway lamented that he and many of his brothers and sisters on the court "are no longer able to give to the cases that ought to have careful attention the time and attention which they deserve."

The Veterans Administration has estimated that the Board of Veterans Appeals, the last step in the administrative review process, hears approximately 34,000 appeals a year. Of these, approximately 74% are denied. It would not be unreasonable to expect a substantial portion of those cases to be appealed, a number upwards of 25,000 cases. On these assumptions, the proposal to allow judicial review of veterans' benefits determinations would increase the federal case load at the district court level a staggering 10 percent. An immediate need for additional federal judges would be an undoubted corollary.

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[1] Annual Report of the Director of the Administrative Office of the U.S. Courts, 1981, p. 200. Figures for 12-month period ending June 30, 1980.

[2] 1983 figures for 12-month period ending March 31, 1983. Source: Administrative Office of the U.S. Courts.

[3] Annual Report of the Director of the Administrative Office of the U.S. Courts, 1981, p. 185. Figures for 12-month period ending June 30, 1980.

[4] Figures for 12-month period ending June 30, 1982. Source: Administrative Office of the U.S. Courts.

This would come at a time when our leading judicial authorities are decrying the impact of an overcrowded docket on the quality of justice delivered by our courts and are encouraging the development of alternate dispute resolution mechanisms outside the judicial system. The Veterans Administration already has such an alternate dispute resolution mechanism. Veterans' benefit disputes are resolved, for the most part, outside of the courts, in a less formal, nonadversarial process which keeps down the transaction costs of the benefits decisions. It is our view that this should remain the case. As the Attorney General recently suggested:

> Such "non-judicial" routes to justice as arbitration, negotiation and administrative process deserve greater employment as alternatives that can complement the judicial system.[5]

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[5] Address of William French Smith, Attorney General of the United States, at the University of Southern California Law Center, May 12, 1983, p. 8.

Veterans' benefits determinations are not the only type of administrative determination not subject to judicial review. In the area of government benefits, for example, review is precluded under the Federal Employees Compensation Act, 5 U.S.C. 8128(b). There is no judicial review provided for certain Medicare determinations. U.S. v. Ericka, 456 U.S. 201 (1982). Of course, the Constitution does not require judicial review of benefits decisions, DeRodulfa v. United States, 461 F.2d 1240 (D.C. Cir. 1974), and the present administrative scheme does permit court review in veterans' cases of allegations of statutory unconstitutionality. Johnson v. Robison, 415 U.S. 361 (1974).

Judicial review in an analogous area - social security benefits decisions - has resulted in approximately 25,000 cases challenging social security determinations by the end of 1982, with 12,045 new cases filed in 1982. This has greatly increased the length of time and expense involved in processing social security cases, from the standpoint of both the claimant and the Social Security Administration. The scope of review established for these cases has varied widely from court to court. The lack of familiarity of the generalist federal judges with the social security system has created inefficiency and even confusion in the way cases are handled. The system also has bred inconsistency. One result of the participation of the federal judiciary has been a lack of conformity of the rules applied in different sections of the country and the need to endure time-consuming appeals up to the Supreme Court to resolve these conflicts. If one of the chief objectives of a fair benefit-determination system is uniformity of result, the social security system certainly proves that provision for judicial review does not ensure consistency.

In addition to the added burden placed on the courts, you should be aware that the Justice Department would require enhanced resources to handle the increase in litigation resulting from judicial review of veterans' benefits determinations. In 1978 the Justice Department told the Senate Veterans' Affairs Committee that 21 attorneys and 24 clerical positions would be required to handle the then-estimated 4,600 cases that it was predicted would arise under the bill under consideration at that time. S. Rep. No. 96-178, 96th Cong., 1st Sess. 131. This was estimated in 1978 to cost $1,420,000. Of course, costs have greatly increased since these estimates were made. Moreover, recent estimates suggest that the total number of cases filed under the bill would greatly exceed the 4,600-case estimate on which that five-year-old projection was based.

If we set aside the issue of cost, however, we must consider whether the proposal to create judicial review of veterans' benefits determinations will somehow enhance the justice accorded veterans. It is our view that this will not happen. The federal courts are not the enchanted land where all wrongs will be made right. The federal courts do not always unerringly discern Congress's intended interpretation of a legislative scheme. Moreover, as has been true in the social security area, additional layers of judicial review can create inconsistencies, the resolution of which requires still further judicial activity and increased costs for the claimant, the government, and the judiciary. This conception of the courts as the sole institutional repository of fairness has led to a judicial system which is suffering from severe overload. To save the judicial system -- and to save the veterans' benefits program from the costs, the delays and the burden of review by non-specialist judges across the country -- this progam should be kept under a purely administrative system.

Thank you, Mr. Chairman.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

September 26, 1983

Honorable G.V. Montgomery
Chairman
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to questions asked of Deputy Assistant Attorney General Carolyn Kuhl at a hearing of the Oversight Subcommittee of the Veterans' Affairs Committee, on proposals to create a right of judicial review of veterans' benefits determinations, held on July 21, 1983.

At that hearing we promised to provide information on the cost of providing judicial review. It is clear that judicial review of veterans' benefits decisions will have a significant budget impact on the judiciary, the Veterans Administration and the Justice Department. The extent of this impact will depend, in part, on the volume of veterans' appeals, whether review will require a trial de novo or a review on the record made at the Board of Veterans' Appeals, and whether the cases are heard in district court or in a special court.

Our estimate is conservatively based on the assumption that the appeals process will generate 4,100 cases in the federal courts and that the appeals will be on the record. We believe that the Department of Justice will require 48 additional attorneys and 22 support personnel, at a cost of $4,690,000. This cost estimate does not reflect the additional resource needs of the Veterans Administration or the courts.

We were asked how the appeal and denial rate in the veterans' benefits system compares with the rate in the social security system. We have asked the Social Security Administration for this information and, as soon as we obtain this data, we will supply it to the Committee.

We were asked whether, in the active military, there was a right of appeal outside the military justice system. Under 10 U.S.C. 876, decisions of courts martial are accorded finality and subsequent direct review outside the military justice system is precluded. It has been held that this section does not preclude review of allegations of violations of constitutional rights or of allegations that the courts martial exceeded its jurisdiction, through collateral suits in district court or through a habeas corpus petition. Schlesinger v. Councilman, 420 U.S. 738, (1975).

Lastly, we were asked whether we were aware of any studies of the impact appeals from administrative actions have on state courts. We have been unable to locate any such studies to date. We do, however, consider the social security system a model for the impact on the courts of appeals from administrative tribunals in the benefits area. We will continue to search for information which will help to answer this very pertinent question.

We hope that this information will prove helpful to the Committee in its consideration of this legislation.

Sincerely,

Paul McGrath

J. PAUL McGRATH
Assistant Attorney General

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

October 14, 1983

Honorable G. V. Montgomery
Chairman
Committee on Veterans Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The following is in further response to a question addressed to Deputy Assistant Attorney General Carolyn B. Kuhl at the hearing held before your committee on July 21, 1983 on legislation to create a right to seek judicial review of veterans' benefits determinations. At that hearing Ms. Kuhl was asked what the rate of reversal was in the appeals process for social security cases.

According to the Social Security Administration, the reversal rates at the last two stages of the administrative process were:

	FY80	FY81	FY82
Administrative Law Judges	55.8%	55.2%	52.7%
Appeals Council	4.9%	4.8%	4.4%

The rate of reversal of the decision below in the U.S. District Courts was:

FY80	FY81	FY82
20.2%	24.7%	21.7%

If we can be of further assistance in this matter, please give us a call.

Very truly yours,

J. PAUL McGRATH
Assistant Attorney General

TESTIMONY OF LT. COL. DAVID J. PASSAMANECK, USA, RET.
NATIONAL LEGISLATIVE DIRECTOR, AMVETS
Before The
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON VETERANS' AFFAIRS
U. S. HOUSE OF REPRESENTATIVES
21 JULY 1983

JUDICIAL REVIEW OF VETERANS CLAIMS
(S.636, 98th Congress)

Mr. Chairman and members of the committee:

The American Veterans of World War II, Korea and Vietnam (AMVETS) is pleased to present its views on the issue of judicial review of veterans claims. Because the invitation does not specify any particular proposed legislation, we will dwell on the concept of judicial review, and only touch on some of the ancillary issues, such as procedure, rules of evidence and attorney fees, which are raised by pending legislation, such as S.636.

AMVETS is fully appreciative of the deserved description of VA adjudicative proceedings as non-adversary. We believe that in most cases the system is administered with skill, compassion and objectivity by VA officials, and that the legitimate interests of the claimants are given the respect to which they are entitled. We are most favorably impressed with the relative low cost and efficiency of the VA adjudicative system, employing as it does the services of trained specialist representatives of the service organizations to assist claimants at no cost to them. When we contemplate the inordinate insurmountable cost associated with litigation in the Federal courts, the VA system looks very good in comparison.

The underlying issue with which we are concerned, however, when we consider providing access to the courts for the veteran claimant, is the question of whether that claimant should have the option of judicial review of his or her claim, in accordance with the claimant's own judgement of the merits of the claim and the risks and costs involved. AMVETS believes that claimants for non-contractural VA benefits and entitlements should have the same right of recourse to the court system as claimants for other governmental entitlements, after exhaustion of administrative remedies.

Whether or not the veteran claimant would be better off being barred, as he or she now is, from judicial review, than if he or she were permitted to risk the cost of litigation is an interesting question for consideration when contemplating resort to the courts in a particular case. AMVETS believes that the right to take that risk belongs, however, to the claimant and should not be precluded by the good offices of VA adjudicators or service organizations, however benevolent their motives. Veterans are full-fledged citizens and are entitled to the same rights and privileges as other citizens. The idea that they must be protected from the harsh realities of the real world by an insulated adjudicative system is an insult, not only to their intelligence but to the sacrifices they have made to preserve the very system of justice from which they are excluded.

As to the scope of review, the courts in Johnson v. Robison, Plato v. Roudebush, Wayne State University v. Cleland and other cases in recent years had made it clear that judicial review does in fact prevail where the issues pertain to the basic fairness of VA regulatory or adjudicative procedures. The cases, however, have not all been consistant throughout the Federal circuits and legislation to clearly define the scope of permissible review is badly needed. The review of VA determinations should be restricted to the evidence of record, the constitutionality or statutory authority of the agency's actions and regulations and whether or not the burdens of proof and benefit of doubt have been properly adheared to. No one is seriously suggesting that the courts substitute for the professional fact-finding machinery of the VA adjudicative system. The claimant is, however, entitled to an evaluation of the significance and weight of the evidence by an impartial tribunal, completely independent of the VA, after exhaustion of administrative remedies. Despite the conceded benevolence of the VA under the current system, the fact remains that in determining the outcome of claims the VA serves as judge, jury and executioner in a closed, potentially self-serving system. In discussion on the issue of judicial review thus far, many of the supporters of review have specified that such review should be limited to questions of law and regulation. AMVETS adheres to this concept, as long as it is clearly understood that it specifically includes a re-evaluation of evidence of record to determine whether burdens of proof have been sustained and benefit of doubt has been afforded. Review, which would be restricted to the constitutionality and statutory authority of regulatory and administrative actions of the VA is what we already have, as a result of the cases which we cited earlier.

With the current fee restrictions, even if judicial review were permitted, the veteran would be precluded from employing competent legal counsel in his cause. If those restrictions were to persist, the service organizations and legal aid agencies would be obligated to assume most of the cost of judicial review of VA determinations, an obligation which would be beyond the capacity of most service organizations. AMVETS, therefore, supports the proposed modifications of the fee restrictions set forth in S.636, 98th Congress. By the same measure of fairness, we believe that the other provisions of S.636 relating to standardizing of administrative procedures, and judicial review should be enacted.

Since 1979, legislation substantially identical to S.636 has been enacted by the Senate, with no corresponding action in the House. All of the major veterans organizations except ONE have consistently supported judicial review in some form. From 1977 through 1979 the VA not only supported judicial review but the General Counsel's office pioneered in the expostulation of its merits. With the change in administrations, the VA switched sides on July 15, 1981 and opposed review, because, as they explained, they came to realize that it would cost too much. In other words we should be unwilling to spend the necessary funds to secure for the veteran the same procedural fairness which every other citizen has relating to all other federal agencies.

The overwhelming majority of the veterans in this country want judicial review, as evidenced by the decisive action of the Senate in 1979 and 1982. The opposition of the minority should not be permitted to continue to block this necessary enfranchisement of our nation's veterans.

STATEMENT OF
JOHN F. HEILMAN
NATIONAL LEGISLATIVE DIRECTOR
DISABLED AMERICAN VETERANS
TO THE
SUBCOMMITTEE ON OVERSIGHT & INVESTIGATIONS
OF THE
HOUSE COMMITTEE ON VETERANS AFFAIRS
JULY 21, 1983

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the over three-quarters of a million members of the Disabled American Veterans, may I say that we deeply appreciate this opportunity to present the views of our organization on the issue of judicial review of Veterans Administration benefit determinations.

Your letter inviting our appearance today indicated that the Subcommittee is not seeking views on specific judicial review legislation that has been introduced in the Congress. However, in order to fully address the issue as it relates to the position taken by the DAV, I shall, of necessity, briefly refer to existing judicial review legislation that is presently pending in the Congress.

Mr. Chairman, in accordance with a resolution approved by the delegates to our most recent 1982 National Convention, the Disabled American Veterans does support the basic concept of judicial review as that term applies to the Veterans Administration. That is to say, we do believe that a veteran, or the dependent or survivor of a veteran, who has received an adverse benefit determination by the Veterans Administration and who has exhausted all appellate avenues within the VA adjudication process--including action by VA Central Office and/or the Board of Veterans Appeals--should be able to receive further redress and judicial proceedings outside the Agency.

As you are aware, Mr. Chairman, the vast majority of VA benefit determinations (the exceptions being certain decisions relating to the Insurance and Home Loan Programs under Chapters 19 and 37, Title 38, U. S. Code) are final and conclusive and not subject to review by any other official or court in the United States (Section 211[a], Title 38, USC). In this regard, the immunization of its benefit determinations from a judicial review process places the Veterans Administration in a position unshared by all other major federal departments and agencies.

When considering the propriety of isolating VA benefit determinations from outside scrutiny, it must be noted that the VA adjudication process is not "adversarial" in nature. That is to say, the VA seeks to grant rather than deny benefits if entitlement is at all possible under existing laws, rules and regulations. Quite possibly, an objective analysis of VA benefit determinations would reveal that, by and large, they are being made by competent, dedicated personnel in an equitable fashion.

However, it must be noted that a VA claim is a claim against the Veterans Administration and that the merits of a claim are evaluated by the Agency itself. The VA thus performs the multiple role of (1) defending itself against the claim, (2) in some instances, representing the claimant in the prosecution of a claim and (3) in all instances, judging a claim which it is also defending itself against.

Common sense would seem to dictate that if one wishes to "sue the railroad," one should not hire an attorney in the employ of the railroad and plead one's case before the "Chairman of the Board."

Clearly, full due process of law and the goal of insuring the most just and equitable consideration of claims filed by veterans, their dependents and survivors require that adverse decisions rendered by the VA should be subject to some form of oversight procedure afforded by a judicial review process.

Having stated this, I must hasten to add that the judicial review resolution approved by the delegates to our 1982 National Convention does not mandate the DAV to seek review in the Federal District Court System as proposed by several measures introduced in the Congress, including the one most recently approved by the Senate (H.R. 2936, as amended by the Senate).

The official position of the DAV is in support of judicial review through the creation of an independent, permanent court--a Court of Veterans Appeals--composed of judges appointed from civil life by the President, such appointment being subject to confirmation by the United States Senate.

As we envision it, the Court, upon petition by a claimant, would have jurisdiction to review adverse benefit determinations of the VA's Board of Veterans Appeals and would have the authority to confirm, reverse, modify or otherwise change such BVA decisions. Review of VA claims and actions associated with such review would be the sole duty and responsibility of the Court.

The Court would also be empowered to (1) determine and allow reasonable legal fees in cases where the claimant is represented by a private attorney and (2) prescribe the qualifications of persons who may represent the claimants in proceedings before the Court.

(There are two such "Court of Veterans Appeals" bills presently pending in the full Committee: H.R. 649, introduced at the request of the DAV by Mr. Montgomery and H.R. 324, introduced for himself by Mr. Roe.)

Mr. Chairman, as the Subcommittee does not wish, at this time, to entertain any discussion regarding the merits or lack thereof of specific judicial review legislative proposals, I shall not here comment upon why we believe such review could best be provided through the establishment of an independent court, rather than in the present Federal District Court System.

However, in support of our position, I do wish to draw the Subcommittee's attention to a resolution approved in March of 1978 by the Judicial Conference of the United States wherein the Conference reaffirmed an earlier (1963) position taken with respect to judicial review. (To the best of my knowledge, the Conference has not since changed this position.)

The 1978 resolution stated in part:

> ...whether judicial review of the denial of veterans' claims should be accorded is a matter of public policy which is solely within the province of Congress to decide and the judiciary should take no position thereon. If Congress should decide to grant such review, the Conference believes that review by a Court of Veterans Appeals, with local hearings by Commissioners of the Court, would provide a more suitable form of review than by the District Courts, the Courts of Appeals or the Court of Claims. (underscoring added)

Thus, Mr. Chairman, while the DAV does believe the existing, informal VA adjudication process to be generally favorable to most claimants, we also believe, in pursuit of a full and unfettered due process of law, that the interests of VA claimants would best be served through the accessibility of a judicial review procedure independent of the Agency (and in line with our National Convention mandate).

Mr. Chairman, I have one other point I wish to make before concluding my testimony:

The current Congressional attention to the issue of judicial review began in the Senate during the First Session of the 95th Congress. Almost five years of hearing consideration have been given to the present Senate passed bill, H.R. 2936 (as amended), and to its immediate predecessors S. 330 and S. 364 (passed by the Senate in 1979 and 1982).

Prior to this, judicial review of veterans' claims was the subject of extensive hearings by the House Veterans Affairs Committee during the Second Session of the 86th Congress. While the Congress declined to enact judicial review legislation at that time, the 1960 hearings are acknowledged as the stimulus which resulted in modification and reform of the VA appellate process (Public Law 87-666).

However, despite this current and past examination of the issue, the record appears to be lacking in one important regard--

no where is there a detailed, analytical study regarding determinations that are made by the VA's Central Office and/or Board of Veterans Appeals.

Aside from the several "horrible example" type of cases that have surfaced (and which do support the need for judicial review), just what is really happening in the VA's appellate process? How prevalent are decisions that can be characterized as being capricious and arbitrary? When "questionable" decisions are rendered, are they more likely to surround issues of fact or issues of law? What are the most common issues on appeal to BVA? To Central Office (administrative reviews)? Do the vast volume of appeals have merit, or can their existence be attributed to the fact that the VA appellate system is "cost free" and completely accessible to all claimants?

Surely the answers to such questions should be a prerequisite to any determinations the Congress may make regarding the need for and extent of judicial review legislation.

To this end, Mr. Chairman--and we state this as a proponent of judicial review--we recommend that an in-depth study of Central Office and Board of Veterans Appeals decisions be conducted by an independent (non-VA) entity and the results of such study be made available to the Congress before any judicial review legislation is finalized.

This concludes my remarks, Mr. Chairman. Again, I wish to thank you and the members of the Subcommittee for allowing me the opportunity to comment on this most important subject.

* * *

Statement of

The American Legion

1608 K STREET, N. W.
WASHINGTON, D. C. 20006

PAUL S. EGAN, DEPUTY DIRECTOR
NATIONAL LEGISLATIVE COMMISSION
THE AMERICAN LEGION

and

ROBERT E. LYNGH, DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION

before the

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON VETERANS AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

on

JUDICIAL REVIEW OVERSIGHT

JULY 21, 1983

STATEMENT OF ROBERT E. LYNGH, DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION
BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON VETERANS AFFAIRS
HOUSE OF REPRESENTATIVES
JULY 21, 1983

Mr. Chairman and Members of the Subcommittee:

The American Legion is pleased to have this opportunity to present to the Subcommittee its views on judicial review.

The present position of the Legion on judicial review is set forth in Resolution No. 141 (Ohio), adopted by the 1982 National Convention. A copy of Resolution No. 141 is attached to this statement, and is commended to the attention of the Subcommittee.

In discussing the present position of the Legion on this subject, it is appropriate to state to the Subcommittee that judicial review continues to be a matter of active consideration by this organization. It is expected it will again be considered at our National Convention, which will take place next month. If the delegates to the convention effect a change in position, the Subcommittee will be so notified. At the moment, however, we must place before the Subcommittee the reasons that have guided the Legion to its present position, and have caused it to look unfavorably on the concept of judicial review since 1959.

Before proceeding further, we would also like to pause and take note of the fact that current bills pending in Congress and providing for judicial review of veterans claims have been modified in some measure from bills presented in earlier Congresses. There seems to be an effort here to address some of the concerns the Legion has heretofore expressed. Whether the modifications would in fact achieve the desired result in actual practice would remain to be seen. However, it must be said that the modifications included in currently pending legislation do not completely allay the concerns the Legion has as to the fundamental effects of the imposition of judicial review on the present system of adjudicating veterans claims.

On the simple face of it, it would seem strange that an organization such as the Legion, which has been engaged in assisting veterans to develop and present claims before the Veterans Administration for more than half a century, would be opposed to a procedure that would open an additional avenue to the individual claimant in his or her quest for benefits. The fact is, however, that judicial review is one of those instances where things are not always what they seem to be - especially in the development of government procedures.

Permit us to present some of the reasons that lead us to make such a statement. And let us first say that the conclusion we shall draw from the points we intend to present is that veterans, under the present system of claims adjudication, within the agency of the Veterans Administration, receive more consideration and have a better chance to develop their claim successfully than they would if the possibility of litigation in the federal courts loomed over each case while it was in the process of development and presentation before local Rating Boards and the Board of Veterans

Appeals. And let us add that part of the problem lies in the fact that the average person, including attorneys, would not understand how this could be so - because they are not experienced in claims development and presentation. It is necessary to engage in this work, as Legion Service Officers do, and to know how the VA adjudication system works, in order to take advantage of the various avenues that can be used to promote successful consideration of claims.

In the first place, entry of veterans claims into the federal judiciary system would immediately place the veteran in an adversary relationship to the United States in seeking approval of claims. We note in the pending legislation, such language as "action shall be brought against the Administrator in the the district court of the United States.....," "the complaint initiating an action.....," and "the Administrator shall file,......answer to a complaint....." In our judicial system, the Administrator would be required to defend against a complaint filed by a veteran, and to do all possible to disprove the validity of such complaint. Even though the case would be heard on the record, and not by trial, the fact remains the individual veteran would be pitted against the Government in an effort to prove Government error.

This is not now the case in adjudication of claims by the Veterans Administration. The present relationship of the claimant to VA is a cooperative one, in which both parties seek to develop the claim to the fullest extent before it is adjudicated. An adversary relationship immediately requires that as the claimant seeks to prove - and we note parenthetically, - not establish - but "prove," his claim, the Government must seek to prevent him from doing that, and must challenge any and all allegations the claimant may put forward, that are not clearly and conclusively supported by direct evidence.

This brings us to the second point; application of the rules of evidence. As soon as a veteran's claim enters the federal judiciary system, the rules of evidence will apply. In this regard it is offered by proponents that court decisions will not be de novo and will be restricted to matters of law rather than of fact. However, we note in pending legislation, the following language: "If the reviewing court finds the Administrator's finding on an issue or issues of fact to be arbitrary, capricious, or an abuse of discretion, the court shall......." Such language does not lead to any confidence on our part that judges will restrict their rulings to matters of law and regulations. Added to which is the fact that we live today in an era of an activist judiciary. Once a federal judge gets a case properly before him, it is doubtful, in our judgment that he will forego ruling on errors to him apparent, in whatever aspect of the case.

Rules of evidence as provided in federal court do not now prevail in the VA adjudication system. Presently, VA will consider and often act on hearsay evidence, second, and even third hand evidence - none of which would be admissible in a court of law. Over the years the Legion has secured favorable decisions in literally thousands of cases based on tangential evidence that a court would never admit.

The argument is put forward that if VA allowed a claim on evidence that is not directly contributory to the case, then the case would never go to court - so what harm is done. Our point is, however, that in our judgment, once VA claims rating officers become aware that ratings they make could conceivably be subject to judicial review they may very well change their attitude to one of "let the courts decide," and begin to rate strictly by the book. If this were to happen many more cases would be denied and thrown into the courts where they would be subject to rules of evidence. We believe this to be a risky proposition at best.

Also, we perceive that in an effort to ameliorate The American Legion's concerns about this matter, pending legislation includes language providing that the courts may not try a veteran's case on appeal from the agency de novo. We must say we have no confidence in this provision, bearing in mind the federal judiciary is a co-equal branch of the government and in recent history especially, federal judges have consistently made clear they do not consider themselves bound by the legislative branch as to how they shall try cases that are properly before them.

Then, there is the matter of the doctrine of res adjudicata. It is our judgment that if judicial review of claims is instituted the doctrine will be applied by the judiciary, language of the Act notwithstanding. It should be borne in mind that the doctrine of res adjudicata is one of the fundamental principles of common law. It would be difficult to avoid it in especially complicated and long extended cases - of which we have many.

Invocation of the doctrine of res adjudicata would be a serious blow to the present efficacy of claims procedure, because it would prevent claims from being reopened once a federal judge had ruled on them. Presently, we are able to secure the multiple reopening of claims by submitting new arguments based on already reviewed evidence, and sometimes by the device of securing transfer of the claim to different rating agencies within VA. Res adjudicata would put an end to this helpful practice, and the result would be that we would lose on a significant number of claims in which we are now succeeding. We do not wish to give up this condition of maximum accessibility to the VA adjudication system.

In summary, it is our considered judgment - and admittedly it is only that - based on our long experience in helping veterans get benefits from the government, that given the judicial review of veterans claims, we will end up losing more cases than we will win - speaking of that category of cases that is most controversial, marginal, and thus most difficult to argue. The American Legion's historical record in winning difficult cases is a good one. We are as expert in the business of veterans' advocacy as is any other person or group that deals in veterans affairs, and all we can offer is our best judgment - which is what we are doing at this time.

One other matter that needs to be mentioned in the context of judicial review is attorneys fees. This is a somewhat delicate matter. We do not wish to deprive anyone of fair recompense for services rendered. In the case of the veterans organizations that now provide advocacy to veterans, that recompense is provided from the dues of members who wish to aid and assist disabled, sick and poor veterans and their dependents and survivors. In the courts, advocacy will have to be provided by attorneys, who will have to be paid.

We have read the language in pending legislation. We can tell the Subcommittee that over time, substantial amounts of money are going to be paid by veterans to attorneys who will handle their cases in court. This money is going to have to be paid from the veterans' pockets, or from benefits they gain from court action. As is stated in our appended resolution, the Legion has a difficult time accepting the payment by veterans - who are mostly poor - of money to anyone to gain benefits to which they are entitled by law, based on service in the Armed Forces of the United States. The defense of attorney fees is that they will be paid on the basis of a free decision by the veteran to retain the services of an attorney. That statement may be true, but it is also true that a claimant will tend to do whatever he feels constrained to do to gain the benefits sought. It is, in our judgment, regrettable that the benefits sought will be reduced in the gaining thereof. We really believe there should be a better way for the veteran to gain just entitlements.

Which leads us to two final points. First, The American Legion position is not set in concrete in the matter of the current limit of $10 as an attorney fee for services rendered in the pursuit of justly entitled benefits. The $10 fee was established many years ago and is obviously outdated. The attorney is fairly entitled to recover the cost of providing service where such services are desired. In that context The American Legion has no objection to an adjustment of the attorney fee now provided by law - with the obvious proviso that the adjusted amount should not be so high as to be lucrative to the provider.

Second, The American Legion wishes the record to show that it has no essential objection to the establishment of an independent Court of Veterans Appeals, whether to sit in Washington, or to have travelling panels. Should Congress decide the establishment of such an independent court would enhance the veteran's effort to obtain benefits to which entitled, the Legion would view such an initiative from a positive perspective.

Finally, let us say that under a Judicial Review Act, there would probably be some cases won. The present VA system is not perfect, because no system is. Based on our sixty years of experience in veterans claims work, it is our considered judgment that there will be more cases lost than won when the VA system becomes subject to the examination and imposed judgment of Federal Judges. In other words, we believe veterans are, in the main, treated more generously by this Government under the present VA system of adjudication than they would be were they subjected to the tender mercies of the Federal Judiciary. In making this statement we ask the Subcommittee to bear in mind, it is not the function of The American Legion to protect the interests of the Government of the United States. That Government has all the power and majesty of its sovereignty to do just that. It is the function of the Legion, under the terms of the Charter granted us by Congress, to look to the welfare of the nation's veterans and that of their dependents and survivors, and that is the sole motivation of our organization in establishing its position in the matter of judicial review.

Once again, we thank the Subcommittee for receiving our views.

Attachment: Resolution No. 141 (Ohio)
1982 National Convention
The American Legion

SIXTY-FOURTH ANNUAL NATIONAL CONVENTION OF THE AMERICAN LEGION
CHICAGO, ILLINOIS, AUGUST 24, 25, 26, 1982

RESOLUTION: No. 141 (Ohio)

COMMITTEE: Veterans Affairs and Rehabilitation

SUBJECT: Oppose legislation which would authorize judicial review of the decisions of the Administrator of Veterans Affairs

WHEREAS, The American Legion is committed to the interests and the well-being of all veterans, their dependents and survivors who seek benefits from the Veterans Administration; and

WHEREAS, from the time of its founding, The American Legion has provided direct assistance to veterans, their dependents and survivors in filing, developing and presenting claims for benefits from the VA without cost to the veteran, and without regard to membership in The American Legion; and

WHEREAS, the experience of The American Legion in more than sixty years of claims work has demonstrated that the present system of claims that is administered by VA works to the best advantage of the claimant in that it does not involve cost to the veteran, is not an adversary proceeding and permits the informal presentation of evidence that operates to the advantage of the claimant; and

WHEREAS, there has been introduced in the Congress, legislation that would permit claimants for benefits from VA to institute litigation in the Federal courts, in furtherance of their claims; and

WHEREAS, such litigation is presently not permitted by reason of the provisions of section 211(a) of title 38, United States Code, which provisions codify existing law; and

WHEREAS, all claimants seeking benefits from VA have the right, as do all citizens, to seek judicial relief in matters involving their constitutional rights; and

WHEREAS, the principal reason advanced in support of judicial review of veterans claims is to insure the claimant's access to due process; and

WHEREAS, on the basis of its long experience in claims work, The American Legion is convinced that claimants presently receive more consideration under due process within the VA system of adjudication of claims than would be provided by judicial review, given the facts that judicial review would place the claimant in an adversary relationship with the government, and would require the claimant to adhere to the rules of evidence in support of the claim, which is not presently the case within the VA adjudication system; and

WHEREAS, under the doctrine of "res judicata" a court decision would preclude a reopening of the claim on the veteran's part, as contrasted by the VA's rules and practices which permit almost unlimited reconsiderations; and

WHEREAS, the prospect of the claimant paying in any fashion to obtain benefits due him from the Government of the United States as would have to be done in the instance of litigation, is abhorrent to The American Legion; now, therefore, be it

RESOLVED, by The American Legion in National Convention assembled in Chicago, Illinois, August 24, 25, 26, 1982, that The American Legion shall continue to oppose the enactment of any measure that would amend 38 USC 211(a), so as to authorize judicial review of the decisions of the Administrator of Veterans Affairs except as presently authorized in 38 USC 755 and 784, and Chapter 37 of such title.

APPROVED

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

STATEMENT OF

PHILIP R. MAYO, SPECIAL ASSISTANT
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON VETERANS AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

JUDICIAL REVIEW OF VETERANS CLAIMS

WASHINGTON, D. C. JULY 21, 1983

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to present the views of the Veterans of Foreign Wars of the United States with respect to judicial review of veterans claims.

The subject of judicial review of Veterans Administration (VA) benefit determinations has been before the Congress for many years. Since the 94th Congress, proposals have been introduced to afford veterans the right to their "day-in-court." As the second largest client agency in the Federal Government, the VA is one of the few agencies whose decisions are final with no further recourse available to the claimant. In supporting judicial review however, the VFW is not being critical of the VA's claims processing apparatus, including the Board of Veterans Appeals (BVA). We have praised its performance in the past and do not see any reason to alter this support. The Board, under constant pressure from mounting workloads and the increasing complexity of its cases (such as radiation and herbicide exposure claims), renders for the most part, fair and equitable decisions. However, human nature being what it is, errors in judgment or interpretation of law and regulation may occur. For this reason, the VFW believes that the VA claimant should be allowed to utilize the court system when certain actions warrant.

The voting delegates to our most recent National Convention passed Resolution No. 775 entitled "Judicial Review," a copy of which is appended to my statement for your consideration. This resolution supports legislation which would provide judicial review of Veterans Administration benefit determinations concerning questions of law and regulation. The VFW believes this narrowly drawn resolution would adequately permit dissatisfied claimants to seek relief in the appropriate court upon exhaustion of their administrative appeals; meaning no lawsuit could be initiated until after a final decision has been rendered by the Administration. By limiting judicial review to questions of law and regulation, we believe a flooding of cases to the federal courts is avoided and, at the same time, the informal, flexible review procedure currently in place within the VA is preserved. We do not believe the interpretation of facts by the Administration has been the major impetus behind the aspiration for judicial review, nor do we contemplate such a review since such would lead to de novo review of claims. Rather, the interpretation of law and regulation, in our opinion, is most in question. We submit, Mr. Chairman, that for many veterans, claims proceedings before the Administration are the most important event in their life; that many believe they are involved in a legal proceeding, the importance of which causes them to question our professional staff as to the availability to them of higher relief in the courts.

Mr. Chairman, although our resolution does not address the issue of attorneys' fees, we are of the opinion the current $10 limitation on such fees payable to attorneys representing veterans before the VA is unrealistic. The limitation on attorneys' fees dates back to the post-Civil War period with the present $10 level being established in 1924. The intent of this limitation was to protect veterans from those who would resort to unscrupulous means in order to generate clients. It does not appear there was consideration given, at the time of imposing this limitation, to the fact that court review would be a possibility or to the sometimes very complex nature of today's cases. This limitation also effectively denies the VA beneficiary the freedom and right of choice of representation in pursuing a claim with the VA.

This concludes my statement. Again, thank you for the opportunity to present our views.

The
American
Legion

For God and Country

★ WASHINGTON OFFICE ★ 1608 "K" STREET, N.W. ★ WASHINGTON, D.C. 20006 ★
(202) 861-2700 ★

July 25, 1983

Honorable G. V. (Sonny) Montgomery
Chairman
Subcommittee on Oversight and Investigations
House Committee on Veterans Affairs
2184 Rayburn House Office Bldg.
Washington, DC 20515

Dear Mr. Chairman:

At the meeting of the Subcommittee of July 21, 1983, on the subject of Judicial Review of Veterans Claims, Congresswoman Johnson requested the Service Organizations to respond in writing to two questions. This letter constitutes The American Legion's response to the Congresswoman's request.

Question No. 1 inquired as to the nature of the problem cases the Legion deals with. If I understood the question correctly, I believe it is in the direction of the type of cases it can be expected will be most likely to go to the courts if judicial review becomes an available alternative.

The most difficult types of case the Legion has to deal with involve the grant of service connection. The issue usually revolves around the acceptance by VA of the evidence presented by the veteran.

Question No. 2 inquired as to the expectation by the Service Organizations of the effect of judicial review on the work of the Service Officers.

The American Legion does not anticipate that judicial review will have an appreciable effect on the work of our Service Officers. Veteran claimants will have to develop their cases and pursue them through the adjudicative processes of the VA before they can approach the Federal Courts. So we would expect our Service Officers to continue to do essentially what they do now - counsel the claimant, assist him to prepare the case, to present the case as advocate on the veteran's behalf and prepare and present the case on appeal should that be necessary. Only the cases that cannot be resolved satisfactorily through the VA adjudication system would be likely to end up in the Federal Courts, where the services of an attorney would be necessary.

If the Subcommittee has any further questions regarding this matter, we will be happy to respond.

Sincerely,

R. E. Lynch

R. E. LYNCH, Director
National Veterans Affairs and
Rehabilitation Commission

Resolution No. 775

JUDICIAL REVIEW

WHEREAS, Section 211, Title 38, U.S. Code, provides that decisions of the Administrator of Veterans Affairs on any question of fact or law under any law administered by the Veterans Administration providing benefits for veterans, their survivors or dependents are final and conclusive and not subject to review by any other official or court of the United States; and

WHEREAS, as mandated by the 82nd National Convention by Resolution No. 620, the Commander-in-Chief appointed a Committee on September 14, 1981, comprised of VFW Service Officers and VFW members who are prominent attorneys to review our position with respect to judicial review; and

WHEREAS, the Commander-in-Chief has reviewed and assessed most carefully the opinions and rationale of the Committee members; and

WHEREAS, the Commander-in-Chief has determined that the preponderence of Committee members support judicial review of the decisions of the Administrator of Veterans Affairs with respect to Veterans Administration law and regulations; now, therefore

BE IT RESOLVED, that the 83rd National Convention of the Veterans of Foreign Wars of the United States, upon the majority recommendation of the duly appointed and constituted ad hoc Committee under mandate of the 82nd National Convention, supports legislation which would provide judicial review of Veterans Administration benefit determinations concerning questions of law and regulation.

Adopted by the 83rd National Convention of the Veterans of Foreign Wars of the United States held in Los Angeles, California, August 13-19, 1982.

Resolution No. 775

OPENING STATEMENT
HONORABLE G. V. (SONNY) MONTGOMERY
JULY 26, 1983

GOOD MORNING. THE SUBCOMMITTEE WILL COME TO ORDER.

THIS MORNING THE SUBCOMMITTEE WILL CONTINUE RECEIVING TESTIMONY ON THE ISSUE OF JUDICIAL REVIEW OF VETERANS CLAIMS. OUR LAST HEARING WAS VERY INFORMATIVE, AND WE ARE VERY GRATEFUL FOR THE EXCELLENT TESTIMONY THE WITNESSES PROVIDED. TODAY'S WITNESSES INCLUDE THE VETERANS ADMINISTRATION, THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AND SEVERAL ORGANIZATIONS REPRESENTING VETERANS.

THE SUBCOMMITTEE RECEIVED REQUESTS TO APPEAR FROM SEVERAL OTHER ORGANIZATIONS INTERESTED IN THE ISSUE OF JUDICIAL REVIEW. UNFORTUNATELY, WE WERE NOT ABLE TO HONOR ALL OF THESE REQUESTS DUE TO TIME CONSTRAINTS. HOWEVER, WITHOUT OBJECTION, SEVERAL STATEMENTS WILL BE MADE A PART OF THE HEARING RECORD.

STATEMENT OF JOHN P. MURPHY
THE GENERAL COUNSEL
OF THE VETERANS ADMINISTRATION
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
HOUSE COMMITTEE ON VETERANS' AFFAIRS

July 26, 1983

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today on behalf of the Veterans Administration to discuss whether there should be judicial review of VA benefit decisions.

It is our considered opinion that veterans as a group are served far better under our present procedure than if the claim process were geared to ultimate judicial review. To clarify this point, I would like to briefly review our claim process. A more detailed description of our adjudication procedures and the Board of Veterans Appeals is included as an attachment to my prepared testimony.

The most salient characteristic of the VA claim process, and what we believe is one of its greatest advantages for our beneficiaries, is its informality. Claimants may submit their own applications without need of any assistance, or if they need advice, they have access to VA employees who specialize in answering inquiries and assisting in the development and submission of claims. At the same level, there exists a wide network of veterans' service organizations which furnish competent claim specialists at no charge to assist claimants in the presentation of their claims regardless of whether the claimant is a member of the organization.

VA adjudication procedures are non-adversary in nature. In almost all cases, a claimant need do nothing more than file a claim. Adjudication of the claim then proceeds without the necessity of the claimant appearing at a hearing, producing further evidence, or presenting witnesses. It must be noted, however, that hearings are available at any point in the claim process. The Agency procures records of military-service and medical treatment basic to most claims. Where these records prove insufficient to establish the benefit being sought, the claimant is clearly told what additional evidence would be required, such as a report from his private physician or statements from comrades in service. All of the evidence submitted by the claimant becomes part of the record without regard to formal rules of evidence. The VA considers its role as a guardian of veterans' rights rather than an opponent, and all evidence which has been submitted by a claimant, or is obtained by the Agency, is considered in arriving at a determination on the claim. Additionally, it is the policy of the VA to grant the claimant the benefit of the doubt, at both the initial and appellate stages. It is our experience that VA employees try to find a way to grant a benefit, and that many claims are allowed by the VA that would be denied under a more adversary process.

3.

Once a decision has been reached, the VA provides the claimant with notice of the decision, as well as notice of hearing and appellate rights. If the claimant disagrees with the decision, it may be appealed within the Agency. The claimant initiates an appeal by filing a Notice of Disagreement which can be nothing more than a simple declaration of disagreement with the decision. On receipt of the Notice of Disagreement, the regional office reevaluates the claim and, if the decision remains adverse, provides the claimant with a Statement of the Case. The Statement of the Case contains a summary of the evidence, citation and discussion of the pertinent laws and regulations, and the decision on the claim as well as the reasons therefor. The Statement of the Case is designed to assist the claimant to understand the law and the evidence relied upon, as well as the evidence lacking to establish entitlement. With the Statement of the Case, the claimant is provided with instructions for completing an appeal and advised of his or her rights to an appellate hearing. The majority of VA hearings are held at this point in the adjudication process. In fiscal year 1982, claims were allowed at the regional office level in over 8,400 of the 68,500 cases in which Notices of Disagreement were filed.

Appeals are heard by the Board of Veterans Appeals in Washington, D.C., which makes a complete and independent de novo review of all the evidence of record. As at the regional office level, service organizations continue their free representation before the Board. Our experience has been that these professional representatives, although not attorneys, have attained the highest level of competence and expertise in the field of veterans law. Thus, even though the agency strives to give all possible assistance, the process also allows for participation of outside representation at no cost to the claimant.

By statute, all BVA decisions must contain separately stated findings of fact and conclusions of law. However, as a matter of policy, all BVA decisions also contain a summary of the contentions and evidence, a concise statement of applicable laws and regulations and a discussion and evaluation intended to respond to all arguments raised. Accordingly, each BVA decision provides a claimant with a complete explanation of the Board's action on each issue.

This is a brief description of the VA's adjudication process, a process that all concerned agree is a good one, particularly from the point of view of insuring that every claimant is granted every benefit to which he or she is entitled. In the face of such virtual unanimity we can only question the wisdom of changing the process by subjecting it to judicial review.

Enactment of judicial review legislation would interject an adversary relationship into what has been a cooperative process. As a matter of principle, the VA should never be placed in an adversary position, much less become an opposing litigant, with respect to any claimant. The presence of repeated challenges to our veteran oriented process would result out of necessity in more rigid and formal proceedings. The involvement of attorneys, whose training and experience is primarily based on the adversary structure of the courts, is also likely to increase the potential of our procedures becoming more adversary in nature. One cannot reasonably expect to require an agency to defend in an adversary proceeding without the agency becoming adversary.

Because the function of the VA is to distribute benefits to veterans and their families, the assumption of an adversary position would be a major change indeed. Such a fundamental change to the VA's position and obligation to assist veterans should not be made in the absence of very strong justifications to support such a change.

One final aspect of the participation of attorneys should also be noted. That is the increased cost to claimants. The purpose of the present attorney fee limitation, 38 U.S.C. § 3404, is, of course, to preserve a claimant's award of benefits to the maximum extent possible. By continuing this limitation for over one hundred years, Congress recognized the principle that benefits which it created should not be consumed in expensive legal fees, but should be distributed to claimants for the purposes inherent in enacting the benefits program. As I noted earlier, the VA's relatively simple procedures for making a claim, and even for pursuing an appeal, do not require the assistance of an attorney. At the same time, the availability of professional help from the veterans' service organizations allows expert, outside representation at no charge to the claimant. In view of the present availability of free, expert assistance, we believe the advantages to claimants which flow from the preservation of virtually their entire award of benefits far outweigh the largely theoretical advantages of attorney assistance. Moreover, attorneys' fees incurred in unsuccessful challenges to VA decisions may impose a financial hardship on some claimants.

6.

In the absence of a specific legislative proposal, we cannot, of course, estimate potential costs that would result from judicial review of individual benefit decisions. However, we can predict that at least some increased costs would result from the added burdens judicial review legislation would impose on both the Executive and Judicial Branches. One such burden would be the additional effort required to adjudicate a case when litigation is a possible result. We do not mean that our competence must improve to withstand court scrutiny, because improved service is a high priority concern in the Agency on a continuing basis. What we fear is that more time and care may be required at all levels of the claim process in documenting the procedural steps taken and the reasons underlying our conclusions. Any time and resources spent on increased formality will be lost from the active concern we are able to show for individual claimants. Litigation generated by the availability of judicial review would likewise result in costs to the VA, the Department of Justice, and the courts. New burdens may also be imposed on BVA or the regional offices in dealing with cases remanded by the courts. Judicial review would also add to the burgeoning Federal caseload referred to recently by the Chief Justice of the United States as a "litigation explosion."

Finally, reliance on a centralized body like the BVA for determinations of veterans' benefit claims eliminates the prospect of inconsistent determinations resulting from litigation in the 94 district courts throughout the country. In our view, a veteran's entitlement to benefits is not a matter which varies with geography, and a veteran should not be subjected to a system in which the resolution of a claim may differ depending on the judicial district in which the veteran resides. We believe the BVA offers a more consistent and systematic approach to claim adjudication, without the frustrating cost and delay inherent in litigation.

In our view, these reasons support a conclusion that the imposition of judicial review on individual benefit decisions, while it might benefit a few individuals, could work to the detriment of veterans as a class by disrupting the informal, non-adversary procedures and the cooperative attitude presently existing between claimants, their representatives and the VA. Veterans now have a fair and impartial forum, the BVA, and our procedures afford a full opportunity to present all evidence and have it fully considered.

Aside from the risk posed to veterans as a group, we question whether the need for judicial review of individual benefit decisions has been demonstrated. We are convinced that the VA's adjudication process not only meets the requirements of due process, but provides greater protection to claimants than is available in comparable proceedings at other agencies. The right to appeal and obtain a de novo review by the Board of Veterans Appeals (BVA), without the significant costs of litigation, provides an effective, practical and uniform method to correct the few errors that inevitably occur in individual cases in any adjudication system, including the Federal courts. Liberal rules for reopening claims and reconsideration of appeals by the Board also serve to insure justice for VA claimants. The review provided by the Board is independent and the VA has scrupulously maintained this independence.

8.

The traditional arguments in support of judicial review of individual VA benefit decisions can be briefly summarized as follows:

1. Because of the tremendous volume of claims that are processed annually and the thousands of appeals filed, there is a significant opportunity for injustice to occur in the VA system;

2. The distinction between veterans and the claimants for other Federal benefits who are permitted access to the courts is unwarranted and should be eliminated; and

3. The lack of judicial review unconstitutionally denies veterans due process in the handling of their claims.

Any initial persuasiveness of these arguments disappears under even a cursory analysis. The first argument seeks to support the necessity for judicial review on the basis of a possibility of injustice. In fact, however, there is nothing to indicate that the current preclusion of judicial review results in injustice. There is no evidence that most VA claimants are not satisfied with the resolution of their claims for benefits.

The argument that veterans have been unfairly singled out in having review of their claims against the Government confined to administrative proceedings also does not withstand scrutiny. Although 38 U.S.C. § 211(a) may be the most visible and widely discussed statute precluding judicial review of administrative action, such statutes can be found throughout the Federal Government and continue to be enforced in a variety of situations. The Administrative Conference of the United States has identified some forty examples of statutes precluding or restricting judicial review of administrative action.

Of course, many of these statutes address specific issues, and some provide an opportunity for review under limited circumstances. The fact remains, however, that judicial review is precluded or severely restricted in such important areas as selective service classification and processing; grant, denial, and revocation of parole; exclusion orders affecting arriving aliens; and determinations controlling coverage of states and localities under the Voting Rights Act. Particularly analogous is the provision of the Federal Employees Compensation Act, 5 U.S.C. § 8128(b), precluding, in language very similar to that used in section 211(a), judicial review of the grant or denial of compensation to Federal employees suffering work-related injuries. Thus, not only have veterans not been singled out for disparate treatment, the informal and supportive nature of the VA's administrative process provides a greater degree of fairness than may be available to participants in other Federal programs.

The argument that the absence of judicial review of individual VA benefit decisions unconstitutionally denies veterans due process of law in the handling of their claims is likewise in error. Due process does not mandate judicial review.

As the District of Columbia Circuit Court of Appeals explained in DeRodulfa v. United States, 461 F.2d 1240, 1258 (D.C. Cir. 1972),

> The Supreme Court has declared that 'the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts;' 'it may,' instead, 'provide an administrative remedy and make it exclusive . . . .' That is precisely what Congress did in the current version of Section 211(a), and Congress was well within its legislative prerogatives when it did so. (Citations omitted)

Contrary to the argument advanced, the courts--the branch of Government responsible for determining the constitutional requirements of due process--have not held that the absence of judicial review of individual VA benefit decisions violates due process.

Accordingly, the issue is not one of constitutionality but of preference. The Social Security Administration's experience with judicial review of Social Security determinations as provided under the Social Security Act illustrates the difficulties

11.

associated with judicial involvement in administrative determinations concerning benefits. The number of suits challenging Social Security determinations has risen drastically over the years to approximately 25,000 pending cases at the end of 1982. Based on fiscal year 1982 figures, Social Security cases were estimated by the Department of Justice to represent almost fifty percent of all civil actions commenced against the United States. The Department of Justice reported, in commenting on S. 349 in the 97th Congress, that it has experienced serious caseload problems since adoption of the judicial review provision pertaining to Social Security benefit determinations, and that it would expect to encounter a similar caseload expansion as a result of enactment of a judicial review provision affecting the VA.

A comprehensive review of the Social Security Administration adjudicatory process by the Center for Administrative Justice in 1977, in a report entitled the "Study of the Social Security Administration Hearing System", analyzed the contributions of judicial review to the Social Security Administration administrative process. The study concluded that any beneficial effect of judicial review on the accuracy of Social Security Administration adjudications is modest at best, while suggesting that such review may have some negative effects. For example, the study noted that district judges, not being specialists in hearing Social Security cases, may lack the perspective of agency appeals officers in assessing the validity of claims. The study also found that the threat of judicial reversal in many cases does not have a measurable beneficial impact on the diligence of agency adjudicatory officials. The study also indicated that the creation of judicial precedents in individual benefit cases has had little positive impact on the administrative process. Finally, the study questioned the actual legitimizing impact of judicial review on the adjudication process. Given this background, the VA is unwilling to endorse any proposal which would create a system analogous to that involving the review of Social Security claims.

In summary, it is the VA's position that the present system for the informal adjudication of claims for veteran benefits is working efficiently and fairly, and that no widespread injustice has resulted from this system. In view of this record, we believe the potential costs and burdens associated with judicial involvement in the day-to-day process of claims adjudication have not been adequately justified. Of even greater significance, however, is our belief that, while judicial review of VA benefit decisions may result in increased monetary awards to a relatively few individuals, it could work to the detriment of veterans as a class by disrupting the informal, non-adversary nature of our procedures and the cooperative attitude presently existing between claimants, their representatives and the VA. Accordingly, we are opposed to subjecting individual VA benefit decisions to judicial review.

ATTACHMENT

Section I

VETERANS ADMINISTRATION ADJUDICATION AND APPELLATE PROCEDURES

Current Veterans Administration claims procedures are designed to afford full due process to claimants and to minimize the possibility of arbitrary and capricious decisions or abuse of discretion by the Administrator. These procedures are defined by statutes and regulations which charge the Veterans Administration with the duty to assist the claimant in developing the facts pertinent to his or her claim and the responsibility to render a decision which grants the claimant every benefit that can be supported in law, 38 C.F.R. § 3.103. Further, if the evidence presented raises a reasonable doubt regarding service origin, degree of disability, or any other point, regulations require that doubt to be resolved in favor of the claimant, 38 C.F.R. § 3.102.

The most salient characteristic of the Veterans Administration claim process is its informality. In most cases, claimants may submit their own applications without need of any assistance, and without an attorney. If claimants desire assistance, or need advice, they have access to Veterans Administration employees who specialize in answering inquiries and assisting in the development and submission of claims. At the same level, there exists a wide network of veterans' service organizations which furnish competent claim specialists at no charge to assist claimants in the presentation of their claims.

Veterans Administration adjudication procedures are intended to be, and in operation are, nonadversary in nature. In almost all cases, a claimant need do nothing more than file a claim. Although adjudication of the claim will actually take place at one of our 58 regional offices, the claimant may personally file or mail a claim to any Veterans Administration facility. The Veterans Administration maintains a number of veterans services offices in various states to assist claimants. In addition, veterans benefits counselors are assigned to hospitals, domiciliaries, nursing homes and out-patient treatment centers to assist claimants and answer questions. All claims received are forwarded to the appropriate regional office for adjudication.

Adjudication of the claim can generally proceed without the necessity of the claimant appearing at a hearing, producing further evidence, or presenting witnesses. The Agency will procure records of military service and medical treatment basic to most claims. Where these records prove insufficient to establish the benefit being sought, the claimant is clearly told, whenever possible, what evidence would be required and what sources are acceptable. As noted, it has always been the policy of the Agency to grant a claimant the benefit of the doubt, and in cases where service medical records do not substantiate the claim, lay evidence of the existence of a condition can be accepted. The Veterans Administration considers its role as a guardian of veterans' rights rather than an opponent, and all evidence which has been submitted by a claimant, or is obtained by the Agency, is considered in arriving at a determination on the claim.

Once a decision has been reached, the Veterans Administration must provide the claimant with notice of the decision, as well as notice of hearing and appellate rights. (A sample of the form providing this notice is attached as Exhibit 1.) A claimant is entitled to a hearing on any issue at any stage in the proceedings. At a hearing, claimants may produce witnesses to testify on their behalf and may adduce evidence of any nature whatsoever in support of their claims. The hearing, wherever possible, is conducted by personnel who did not participate in the initial decision. The right to present and question witnesses is provided by the hearing procedures. However, the personal appearance of witnesses is not required. The informal nature of the process almost always results in all of the testimony desired by the claimant becoming a part of the record through letters and statements written on the claimant's behalf, without regard to formal rules of evidence. The VA may even send an employee to a potential witness' home or business to receive testimony for the record.

Any decision with which a claimant disagrees may be appealed within the Agency. An appeal is initiated by filing a Notice of Disagreement with the action in question within one year from the date of notification thereof. This can be a simple declaration of disagreement with such action. On receipt of a Notice of Disagreement, the regional office reevaluates the veteran's claim. If the denial is continued, the claimant is provided, usually within 90 days of receipt of the Notice of Disagreement, a Statement of the Case. The provisions of 38 U.S.C. § 4005 require that the Statement of the Case contain a summary of the evidence, citation and discussion of the pertinent laws and regulations, and the decision on the issue as well as the reasons therefor. The Statement of the Case is designed to assist the claimant to understand the law and the evidence relied upon, as well as the evidence lacking to establish entitlement. With the Statement of the Case, the claimant is provided with a form which provides instructions for completing a Substantive Appeal. (A sample of this form is attached as Exhibit 2.) The claimant is also notified of the right to appear at a personal hearing before the Board of Veterans Appeals in Washington, D.C. The personal hearing may also be held before a traveling section of the Board of Veterans Appeals which makes periodic appearances at regional offices. In lieu of either of these alternatives, a claimant may also request a hearing on appeal before members of the regional office, the transcript of which is forwarded to the Board of Veterans Appeals in Washington.

Following any hearing and the timely receipt of a Substantive Appeal, the case is certified to the Board of Veterans Appeals. After a complete and independent review of the claim on the basis of all of the evidence of record, the Board renders its decision. The Board's action may be to allow the claim, deny it, or remand the case to the regional office having jurisdiction for further development. In the absence of obvious error of a material and reversible nature, the Board's decision is final. Section 4004 of title 38 requires that all Board decisions contain separately stated findings of fact and conclusions of law. As a matter of formal policy, all Board decisions contain a summary of the contentions and evidence, a concise statement of applicable laws and regulations and a discussion and evaluation intended to respond to all arguments raised and afford a complete explanation of the decision on each issue.

Veterans Administration

NOTICE OF PROCEDURAL AND APPELLATE RIGHTS

We have based our decision on the evidence of record in your case and the applicable law. This explains your procedural and appellate rights in connection with this decision.

REPRESENTATION. You may be represented, without charge, by an accredited representative of a veterans organization or other service organization recognized by the Administrator of Veterans Affairs, or you may employ an attorney to assist you with your claim. Typical examples of counsel who may be available include attorneys in private practice or legal aid services. The services of a recognized attorney are subject to a maximum fee limitation of $10, set forth in 38 U.S.C. 3404(c). Expenses incurred in the prosecution of a claim must be approved in accordance with 38 C.F.R. 14.634(b) prior to demanding or receiving reimbursement from the claimant. If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action on your part is required.

NEW EVIDENCE. You may submit additional evidence to strengthen your claim. It is in your interest to send us any new evidence as promptly as possible. We will carefully consider it and let you know whether it changes our decision.

PERSONAL HEARING. If you desire a personal hearing to present evidence or argument on any point of importance in your claim, notify this office and we will arrange a time and place for the hearing. You may bring witnesses if you desire and their testimony will be entered in the record. The VA will furnish the hearing room, provide hearing officials, and prepare the transcript of the proceedings. The VA cannot pay any other expenses of the hearing, since a personal hearing is not required.

APPEAL. You may appeal our decision to the Board of Veterans Appeals at any time within one year from the date of this letter if you believe the decision is not in accord with the law and the facts now of record. You can start the appeal process by filing a Notice of Disagreement. You may do this by writing a letter to this office stating that you wish to appeal. If more than one benefit is involved, you should identify the benefit or benefits for which you are appealing. If you decide to appeal, we will advise you further as to your procedural rights as your claim progresses through the several stages of the appeal process.

NOTE: For further information about appeals, see VA Pamphlet 1-1.

VA FORM 1-4107
JUN 1982

SUPERSEDES VA FORM 1-4107, NOV 1979, WHICH WILL NOT BE USED.

☆U.S. Government Printing Office: 1983—381-486/5819

EXHIBIT 1

Form Approved
OMB No. 2900-0085

Veterans Administration

IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed

VETERANS ADMINISTRATION
APPEAL
TO
BOARD OF VETERANS APPEALS

1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN *(Type or print)*

2. INSURANCE FILE NO. OR LOAN NO. *(If pertinent)*

3. CLAIM FILE NO. *(Include prefix)*

4. IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN INDICATE RELATIONSHIP

☐ WIDOW ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER *(Specify)*

5. NAME OF CLAIMANT *(If other than veteran)*

6. ADDRESS OF CLAIMANT *(Number & street, city, State & ZIP Code)*

7. DATE OF DECISION BEING APPEALED

8. VA OFFICE WHICH MADE DECISION BEING APPEALED *(City & State)*

REPRESENTATION ➧ See Par. 6 of Instructions on reverse side

HEARING ➧ See Par. 7 of Instructions on reverse side.

9A. DO YOU WISH TO BE PRESENT AT A HEARING?

☐ YES ☐ NO

9B. IF YES, SPECIFY PLACE

☐ FIELD OFFICE ☐ WASHINGTON, D.C.

NOTE: A personal hearing is not necessary nor is a decision made at the time of the hearing.

10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW. *(State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.)*

(Attach additional sheets, if necessary)

11. DATE

12. SIGNATURE OF CLAIMANT *(Or representative)*

VA FORM AUG 1981 1-9

SUPERSEDES VA FORM 1-9, JUN 1979, WHICH WILL NOT BE USED.

EXHIBIT 2

MISSION OF THE BOARD OF VETERANS APPEALS

The Board of Veterans Appeals was established by law to decide appeals for benefits under laws administered by the Veterans Administratio (38 U.S.C. 4001 - 4009). Decisions are made by the Members of a Section of the Board, appointed with the approval of the President. It is th mission of the Board to decide appeals with sympathetic understanding and as promptly as possible, in order to grant all benefits to whic veterans and their dependents and beneficiaries are entitled. Decisions are based on the entire record.

GENERAL INFORMATION

The law grants the right to have an adjudication decision reviewed on appeal by the Board of Veterans Appeals. (38 U.S.C. 4004(a)). If yo want to appeal, the procedure is as follows:

(1) *Write the Veterans Administration office expressing disagreement or dissatisfaction with the decision on the claim.* This is a "Notice o Disagreement." It must be filed within 1 year from the mailing of notice of the decision (60 days where 2 or more persons claim same benefit

(2) *A "Statement of the Case" is then sent the claimant and his representative by the Veterans Administration office.* It contains summary of the facts, the applicable law and regulations and gives the reasons for the decision. Its purpose is to give the claimant sufficien information to complete his appeal in the most effective manner, if appellate review is still desired.

(3) *File a "Substantive Appeal."* This completes the appeal. Use this form (VA Form 1-9). Follow the instructions below.

PRIVACY ACT NOTICE

The information requested on this form is solicited under 38 U.S.C. 4005(d)(3)(4). It is used by the Board in identifying those areas o disagreement requiring appellate review, and is mandatory for completion of your appeal. The information may be disclosed outside the VA a permitted by law, or as stated in the "Notices of Systems of VA Records" which have been published in the Federal Register in accordanc with the Privacy Act of 1974. Failure to furnish this information will have no adverse effect on any other benefit to which you may be entitle

INSTRUCTIONS

IMPORTANT: Use this form to file a substantive appeal only after receiving the statement of the case referred to above.

1. WHO CAN SIGN A SUBSTANTIVE APPEAL. A substantive appeal may be signed by:

(a) The claimant personally.

(b) The accredited representative of a service organization provided a proper power of attorney is filed, or by an attorney provided a proper declaration of representation is filed.

(c) The guardian or other proper fiduciary of an incompetent claimant, or, if none, by the next of kin or next friend.

2. TIME LIMIT FOR FILING. A substantive appeal should be filed within 60 days after the statement of the case is mailed (30 days where 2 or more contesting claimants are involved). The 30-day period applies only where one claim is allowed and another denied, or allowance of one claim would result in a lesser payment to another claimant. An extension of time may be granted for good cause. A substantive appeal postmarked prior to expiration of the applicable period will be accepted as timely filed. (38 U.S.C. 4005(d)(3), 4005A(b)).

3. FORM OF APPLICATION. This form should be used for filing a substantive appeal. The benefit sought must be clearly identified. The date of the action appealed should be inserted in Item 7. In completing Item 10, care should be taken to set out errors of fact or law believed to have been made in the decision – that is, the reasons for disagreeing with the decision being appealed. Insofar as possible, relate all statements to specific items in the statement of the case. Identify any statement of fact in the statement of the case with which there is disagreement. The claimant will be presumed to be in agreement with facts stated to which no exception is taken. An appeal which is insufficient may be dismissed.

4. PLACE TO SEND SUBSTANTIVE APPEAL. The substantive appeal should be mailed to or filed with the Veterans Administration office which entered the decision being appealed.

5. SUBMISSION OF ADDITIONAL EVIDENCE. Where a substantive appeal is timely filed, a reasonable time will be granted, if requested, to file additional evidence before final consideration of the appeal. Any additional evidence should be submitted to the Veterans Administration office in which the appeal was filed.

6. REPRESENTATION. A claimant may be represented in the presentation of his claim by a recognized service organization provided a proper power of attorney is furnished, or by an attorney provided a proper declaration of representation is furnished. Only one representative is permitted at any one time in the prosecution of a specific claim. A form for filing power of attorney may be obtained from the local Veterans Administration office. (38 CFR 19.129, 19.130, 19.133)

7. HEARING ON APPEAL (Read carefully).

a. Hearing Granted, If Desired, And Conducted Informall A hearing will be granted where a claimant or his representati expresses a desire for a personal appearance. The Board operat under Rules of Practice, but its procedures are informal. They a designed to make it easy for a claimant or his representative t present argument or testimony relevant and material to th appellate issue. Strict rules of evidence are not followed. A evidence on file is thoroughly considered regardless of whether hearing has been held.

IMPORTANT: If a hearing is desired, such request should b made by completing Items 9A and 9B, indicating the place o hearing – Veterans Administration field office or Washington, D.C (See subparagraph c below.)

b. Who May Appear. The claimant, his representative, o both, may be heard. Either may arrange for the voluntar appearance of witnesses to testify.

c. Place of Hearing. A hearing may be held at one of th following places selected by the claimant or his representative:

(1) In Washington, D.C., before a Section of the Board o Veterans Appeals.

(2) In the Veterans Administration field office whic originally decided the claim or, if more convenient, any othe Veterans Administration field office which has appropriat personnel and technical facilities for conducting a hearing. In tha event, the field office personnel act as a hearing agency for th Board of Veterans Appeals, but do not decide the appeal.

There is no provision for the Government to bear any expens incurred by the claimant, his counsel or witnesses in connectio with attendance at a hearing.

8. ORDER OF CONSIDERATION. Appeals are docketed and considered in the order in which they are received except tha for sufficient cause the Board may advance a case on the docket. (38 U.S.C. 4007.)

FOR VA USE ONLY

APPEAL RECEIVED (VA Date Stamp)

APPEAL RECORDED (Date)

SECTION II

OVERVIEW OF THE BOARD OF VETERANS APPEALS

ESTABLISHMENT

The Board of Veterans Appeals is the appellate body charged with the responsibility to make final decisions on claims appealed from the various field offices of the VA. Its independence in that role is a mainstay in assuring the fairness of VA claims decisions. During the period from 1920 to 1933, an awkward, cumbersome and time-consuming appellate system for veteran claims developed. Almost every type of administrative board was tried in an unsuccessful attempt to develop a permanent and workable system. A number of appellate bodies developed whose jurisdictional boundaries were obscure. Other problems with the system included a lack of centralization, uniformity, and finality. By 1933, there were pension review boards, area boards, a Central Office Board, a Council on Appeals, the Solicitor's Office, and finally, the Administrator, all responsible for deciding appeals.

The Board of Veterans Appeals was created by Executive Order 6230, July 28, 1933. From the very beginning, the Board was designated a quasi-independent tribunal and was intended to provide one review on appeal to the Administrator of Veterans Affairs. The individuals responsible for the design of the Board were looking to establish an independent review board which could serve as a model for all agencies of the Federal government. The independence of the Board was strengthened by providing for life-time Board member appointments which required the approval of the President. The Board itself was associated with the Agency for budget and personnel purposes while the Chairman of the Board was answerable only to the Administrator. To this day the Board has remained wholly independent from the VA in its decision making and no Administrator has interfered in this process. The independence of the Board members was recently reaffirmed when the President excluded them from Merit Pay under 5 U.S.C. 5401(b)(2). The basis for this exception was that inclusion of this group in Merit Pay could adversely interfere with their quasi-judicial independence.

ORGANIZATION

The operations of the Board of Veterans Appeals are directed by a Chairman and Vice Chairman, both of whom are appointed by the Administrator with the approval of the President. By statute, the number of Board members is limited to 50. These members are currently assigned to 17 appellate sections. Each section is usually comprised of three Board members, one of whom is designated Chief Member. Each section has from six to seven staff attorneys who initially review the appeals and draft proposed decisions. The decision is not considered to be final until all three Board members have reviewed the entire record, signed the decision, and the decision has been dispatched. The deliberations of the Board members are entirely independent and their decisions must be unanimous. The Chairman or Vice Chairman must participate in the decisionmaking process in those situations wherein there is a dissenting opinion and has the authority to concur with the majority of members to finalize the decision (38 U.S.C. § 4003(b)). If agreement cannot be reached, the Chairman or Vice Chairman has regulatory authority to expand the voting panel (38 C.F.R. § 19.145).

APPELLATE PROCEDURES

A general description of the Board's appellate procedures is included in Section I of this Appendix and will not be repeated here. There are, however, certain aspects of the Board's procedures that merit further discussion.

Advisory Opinions

During the course of their deliberations, Board members may seek an advisory medical opinion. In cases involving a medical controversy, the record may be referred to the office of the VA Chief Medical Director, the Armed Forces Institute of Pathology, or an independent medical specialist. These opinions are used for advisory purposes only. Although they are usually included in the text of appellate decisions, Board members are free to accept or reject them. These opinions are extremely valuable in areas of serious medical complexity and are accorded great weight by the Board. Although Board members may obtain these opinions on their own initiative, an appellant or representative may also request that one of these opinions be obtained prior to disposition of the appeal.

Finality, Reopening and Reconsideration

All questions on claims involving benefits under the laws administered by the VA are subject to one review on appeal to the Administrator. Final decisions on such appeals are made by the Board. Except for insurance appeals, there is no recourse to the Federal courts if an appellant is dissatisfied

3.

with the Board's decision. (38 U.S.C. §§ 211(a), 784, 4004(a)). A claim can be reopened after a final determination has become final or after a Board of Veterans Appeals decision by submitting evidence which would support a new factual basis for a decision (38 U.S.C. § 4004(b)). This, in effect, constitutes a new claim.

Although appellate decisions are final, they can be reviewed at any time to determine if there is an obvious error of fact or law. This "reconsideration" may be initiated on the Board's own motion or that of an appellant. (38 U.S.C. § 4003). Reconsideration may be requested by filing a written brief in support of this motion, specifying those elements of the decision which are either factually or legally erroneous. The brief will be reviewed by the Chairman of the Board. If it is believed that an adequate argument has been made in support of a finding of error, the records will be docketed for reconsideration and a panel assigned to review the merits. Normally the panel will consist of those individuals who were the original signatories to the decision plus three additional Board members. If it is determined that there is no reasonable argument supporting a finding of error, the appellant will be notified that the request for reconsideration has been denied. Reconsideration is limited to a review of the prior decision and the evidence of record which was before the Board at the time of that decision. (38 C.F.R. §§ 19.148 through 19.152).

Precedence and Appellate Decisions

Board of Veterans Appeals decisions are not binding precedents; however, the Board strives to maintain uniformity and consistency in the deliberations of its 17 Board sections. The majority of decisions involve dissimilar medical histories and health patterns of individual veterans and, therefore, must be decided on their own merits.

In addition to statute and Agency regulations which are binding upon the Board of Veterans Appeals in its deliberations, 38 U.S.C. § 4004(c) specifies that instructions of the Administrator and precedent opinions of the General Counsel are binding upon the Board. (See also 38 C.F.R. § 19.103.)

There are many manuals, technical bulletins, circulars and other administrative issues which are published by the various departments of the Veterans Administration. Unless a particular publication is signed by the Administrator, it is not controlling in appellate decisions. Board members may review sections of these publications for information purposes and background, or to assure a claimant received proper procedural protections, but they are not required to follow the dictates of these issues.

BVA WORKLOAD AND RESPONSE TIME

The Board decides approximately 34,000 appeals a year. Of that number, approximately 13 percent are allowed, 14 percent remanded, and 73 percent denied. The appeal process is begun by the claimant filing a notice of disagreement with the field office. For fiscal year 1981, 68,000 such notices were filed, 40,000 of which were prepared for transfer to and review by the Board.

Since its formation in 1933, the Board of Veterans Appeals has entered more than 1.5 million decisions. During the pre-statement of the case period (1933-1963) all appeals were sent to the Board for resolution. From about 40,000 in the early years, the number of appeals fell to less than 10,000 in 1944--at the height of World War II. The greatest number of appeals came in 1950--more than 80,000. Enactment of the statement of the case law in 1963 effectively cut the number of appeals that reached the BVA by one half. In 1970, the number of appeals fell to less than 21,000.

The Vietnam-era peak came in 1972-73 when nearly 30,000 appeals reached the Board. The number again began to grow in 1975 and since then there has been a sharp upswing. The number of new appeals to the BVA reached 42,000 in 1982 and the Board's pending workload stood at more than 27,000. This trend continues. We attribute the heavy appellate workload to three broad factors:

> First, veterans, like other members of our society, have become much more litigious than they were in the past. We note this in the fact that we are getting more appeals at a time when the number of claims being filed is declining.
>
> Second, aging veterans, pushed by economic conditions, seek whatever sources of income are available to them. Veteran benefits such as compensation or pension are areas in which many seek to increase their incomes.

> Third, and a very significant factor, is the better training and more active roles taken by the national service organizations. These organizations are doing an excellent job in assisting veterans in developing their claims and pursuing their appeals.

The Board believes that total response time to an appeal should be about eleven months--seven in field station processing and four at the Board. Unfortunately, appeals are taking much longer than that at this time. Since the sharp upswing in the number of appeals, the Board's response time has shot from 2 1/2 months in 1976 to nine months in 1982. VA field stations have been able to cope with the workloads and have held their response times to an average of about seven months.

The Board has taken several actions to reduce the pending caseload and cut back on response time. It has formed a skeletal 17th section from the resources provided for 16 sections. It has also modified and shortened handling procedures and developed a positive case management system through automation of its control and locator functions. It has taken steps to improve and to automate its word processing capabilities. Despite the Board's best efforts, however, the appeals keep coming--faster than they can be handled.

Because of the increasing number of appeals being filed and the corresponding increase in the Board's average response time, we recently submitted proposed legislation to Congress that would permit the Board to expand to up to 65 members and 21 Board sections. In the absence of judicial review of BVA decisions, we anticipate that the requested increase in Board membership will be sufficient to meet the increasing appellate caseload and to eliminate and prevent the recurrence of the present backlog of pending cases.

Board of Veterans Appeals Washington D C 20420

Veterans Administration

JUL 22 1983

July 22, 1983

In Reply Refer To: (01)

Honorable G. V. (Sonny) Montgomery
Chairman, Committee on Veterans' Affairs
House of Representatives
Washington, D.C. 20525

Dear Mr. Chairman:

My staff has obtained some information from the Statistical and Reports Branch, Office of Hearings and Appeals, SSA (Ballston) and from the Office of the General Counsel, SSA (Baltimore). The stages of adjudication at Social Security are as follows:

1. Claimant files with the local SSA office and that office sends claim to state agency for initial determination.

2. If denied, the claimant has 60 days in which to file a request for reconsideration. Request for reconsideration goes back to the state agency for review.

3. If notice of reconsideration is a denial, the claimant has 60 days in which to file a request for hearing. This is an oral hearing (with or without representation) before an Administrative Law Judge (ALJ). Out of 29,172 dispositions in May 1983 there were 15,206 allowances (52.1%). The response time from the request for hearing until the ALJ disposition was 185 days.

4. If ALJ decision is a denial, claimant has 60 days in which to ask for Appeals Council (AC) review. Appeals Council can deny the request for review or it can affirm or reverse the ALJ decision. Out of 9149 dispositions in May 1983, there were 31 affirmations, 171 dismissals, 7,988 denials, 482 allowances and 477 court remands processed. The allowance rate was 5.3%. The latest response time information available is for FY 1981 when the average response time for all dispositions was 67 days. There were 63,559 total dispositions at the Appeals Council level for FY 1982. Over the years their allowance rate is 5%, remand 7% and denial rate 88%.

5. If AC decision is a denial, claimant has 60 days in which to file a civil action in U.S. District Court. About 20% of the AC denials are appealed to the courts. There were 12,045 new court cases filed in FY 1982 and 22,000 are expected for FY 1983. In FY 1982 there were 1,172 allowances (about 10%). The denial rate is about 80%.

Sincerely yours,

Kenneth E. Eaton

Kenneth E. Eaton
Chairman

HEARING BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
ON
JUDICIAL REVIEW OF VETERANS CLAIMS

STATEMENT OF LOREN A. SMITH
CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Accompanied by:

Richard K. Berg
General Counsel

July 26, 1983

Mr. Chairman and Members of the Committee:

I am Loren A. Smith, Chairman of the Administrative Conference of the United States. I want to thank you for the invitation to testify before your committee. I am accompanied by Richard K. Berg, General Counsel of the Conference.

The Administrative Conference is a Federal agency whose statutory mission is to perform studies and recommend improvements in the administrative procedures used by Federal departments and agencies, 5 U.S.C. S 574. We try to assist the agencies and Congress in developing procedures that provide greater fairness and expedition for participants in the administrative process, more effective attainment of agencies' goals, and lower costs to the taxpayers.

The Administrative Conference has 91 members, approximately 50 from the departments and agencies in the Federal Government and 40 from the private sector and State or local government. The 91st member is the Chairman, who is appointed by the President with the advice and consent of the Senate. The Conference takes formal positions only through the votes of our membership at our semiannual plenary sessions.

The Committee has asked me to discuss the question of whether to provide for judicial review of Veterans Administration benefit determinations. As you know, the Administrative Conference considered this question in 1978, and decided, after a full debate, not to take a position. Although I arrived at the Conference in 1981, I have familiarized myself with the record of our consideration so that I could describe to you what we did and did not do and why.

Let me first describe to you briefly how the Conference process for adopting recommendations and other formal position statements works. The Conference operates through a standing committee system. Each member of the Conference serves on one of our standing committees. (At present we have six standing committees, although in 1978 there were nine.) The committees usually act on the basis of proposals and reports prepared by consultants, often academics, engaged by the Office of the Chairman. Ordinarily, the committee will meet several times in the course of considering a report and preparing a recommendation. Comments are sought from affected agencies and interested members of the public. Frequently, in recent years, we have published notice of the proposal under consideration in the Federal Register in order to obtain a broader range of comments. When the committee reports out a recommendation, it is referred to the Council of the Conference, which serves as our board of directors. The Council has the responsibility for determining the agenda for the plenary sessions of the Conference. If the Council judges that the proposal is ready for consideration by the Assembly of the Conference, it is placed on the agenda for the next plenary session. At the plenary session the proposal is presented by the chairman of the committee which reported it, assisted by the committee consultant. It is subject to full debate and may be amended, approved or rejected. If approved, the recommendation becomes an official position of the Conference. It is published in the Federal Register, and we in the Office of the Chairman are responsible for bringing it to the attention of those to whom it is addressed.

To turn to our study of judicial review of VA decisions, we commissioned this project in 1978 because we were aware that proposals were then pending in Congress to provide for such review. We selected as our consultant Professor Frederick Davis of the University of Missouri School of Law. Professor Davis was a recognized expert in administrative law, who had previously written on the subject. He prepared a report, which was referred to our Committee on Judicial Review. The Committee, after considering the report and obtaining the views of the VA, the Department of Justice and the principal veterans' organizations, approved a proposed recommendation which called for amending 38 U.S.C. § 211(a) to permit judicial review of Veterans Administration decisions.

The Committee's proposal, a copy of which I attach, called for providing for judicial review of VA decisions in the U.S. district courts at the instance of any person adversely affected. Review would be on the administrative record. That is to say, the court would not be asked to retry the facts but to determine whether on the record developed before the VA, the Administrator's action was arbitrary, capricious, or otherwise unlawful. The recommendation emphasized that it was not intended to affect the "general informality and flexibility" of the decisionmaking process at the VA.

The proposed recommendation was considered by the Assembly of the Conference at our Eighteenth Plenary Session in December, 1978. After a lively debate, the Assembly voted to table the proposal, that is to say, to take no action on it. (We have furnished this Committee a transcript of the debate in connection with an earlier hearing on this subject.)

Briefly, it was the position of Professor Fred Davis and the Judicial Review Committee that the principle of unreviewable administrative action—at least with respect to cases such as claims for veterans' benefits, which do not involve delegations of broad administrative discretion, but rather the application of specific statutory standards to individual situations—is wrong and contrary to our general practice. Furthermore, while the proponents admitted that they could not show that the VA's administrative process worked badly or unfairly, they cited anecdotal evidence of occasional arbitrariness, and they argued that without judicial review as a means of inquiring into VA's practices, it would be hard to say how well the system as a whole works. Finally, it was urged that under the Committee's proposed recommendation, which called for a fairly narrow standard of judicial review, it was unlikely that the additional burden on the courts would be significant.

The opponents of the proposal, notably Professor Kenneth Culp Davis, the late Judge Harold Leventhal, and Professor Antonin Scalia (a former Conference Chairman, who is now serving on the U.S. Court of Appeals for the D.C. Circuit) argued that nonreviewability of VA determinations is not unique. One example cited was the nonreviewability provision applicable to claims under the Federal Employees Compensation Act, 5 U.S.C. S 8128(b). The opponents also feared the additional burden on the courts, and doubted that occasional review by Federal judges unfamiliar with VA's statutes and regulations would really improve the results in VA cases. Finally, the argument was made that even though the recommendation did not call for more formality in VA procedures, the prospect of judicial review would tend to have that effect because the administrative record would be developed with an eye to the possiblity of judicial review.

In the course of the debate a number of compromise positions were suggested. One was to permit judicial review, but only as to constitutional questions or only as to questions of law; review of the VA's factual determinations or exercises of discretion would be barred. Another was to provide review, but in a specialized court, a Court of Veterans Appeals. Ultimately, however, the Assembly voted to table the entire proposal. I think this must be regarded not so much as a positive endorsement of the present statutory provision as a judgment that the proponents of the recommendation had not carried their burden of proof, a feeling, perhaps, that "if it ain't broke, don't fix it."

At any rate, although the decision to table did not preclude future Conference action on the subject, the Chairman's Office and the Judicial Review Committee concluded that it would not be worthwhile to pursue the subject further at that time, and the Conference has not returned to the subject since then.

Thus, my report ends on a note of frustration. I am not sure how helpful it is to this committee, which is considering the question of judicial review, to know that five years ago the Administrative Conference studied the same question, but was unable to reach a conclusion. However, having examined the record of our previous action with some knowledge of how Conference members tend to think, I do believe that the Conference's problem was that it had attacked the problem at the wrong end. It had attempted to prescribe a cure without having first established to its satisfaction a diagnosis of the ailment. The Judicial Review Committee's argument for providing for review was stated primarily as a matter of principle, and as such it failed to overcome such practical objections as the prospective burdens on the courts and the unfamiliarity of the courts with the subject matter.

The Conference would have been wiser, I believe, to have devoted more attention to the VA's own processes, with a view to attempting to pinpoint the causes of dissatisfaction, if any. This is true because different symptoms are likely to call for different remedies. For example, if the problem is arbitrariness in the statutes or in VA's interpretations of the statutes, improved procedures within VA will offer no help because an administrative tribunal cannot be expected to question official agency positions. However, judicial review limited to certain questions of law might be useful. Indeed, it is my understanding that notwithstanding 38 U.S.C. S 211(a) the courts will examine the constitutionality of the statutes the VA administers and the legality of the regulations it issues. Johnson v. Robison, 415 U.S. 361 (1964); Wayne State Univ. v.

Cleland, 590 F.2d 627 (6th Cir. 1978). If, on the other hand, the problem is inconsistency, bias or other weaknesses in the decisional process, judicial review under a narrow standard of review will at best provide occasional relief in egregious cases whereas improved managerial controls, a specialized reviewing body, or, perhaps, an agency ombudsman, might be a more constructive solution. I think the members of the Conference felt a natural reluctance to prescribe a solution where there was not a clear demonstration of the size and nature of the problem.

It seems to me that there is a lesson for this Committee in our experience. You have, of course, much greater familiarity with the programs and the procedures of the Veterans Administration than did the Conference. And oversight hearings are an excellent means for inquiring into weaknesses and dissatisfaction with the Veterans Administration's processes. Once you have reached conclusions with respect to the problems, if any, within the VA, I believe you will be in a much better position to determine whether there should be judicial review and what should be its form and scope.

I am grateful for the opportunity to appear before you, and I would be glad to try to answer any questions you may have.

Attachment

RECOMMENDATION PROPOSED BY THE
ACUS COMMITTEE ON JUDICIAL REVIEW
RECOMMENDATION 78-___

JUDICIAL REVIEW OF BENEFITS DECISIONS OF THE VETERANS ADMINISTRATION

The Veterans Administration annually distributes approximately 13 billion dollars in various types of benefits. Its procedures for handling claims for those benefits are informal. In most cases, a claimant need do nothing more than file the proper application form. The VA staff then collects the evidence necessary to establish whether the claimant is eligible for the benefits sought. If the claimant disagrees with the decision on the claim, he or she may appeal to the Board of Veterans Appeals within the agency. The decision of this Board is made after an independent review of the file, which contains all of the materials collected by the staff or submitted by the claimant, and an informal hearing if one is requested.

Section 211(a) of Title 38 of the United States Code provides that the decisions of the VA in administering its benefits program "shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise." (There are exceptions for some insurance and loan claims, as to which there are specific provisions for judicial remedies elsewhere in Title 38.) The VA is exceptional, even among federal agencies administering benefit programs, insofar as disappointed claimants have no access to the courts to test adverse agency decisions. Although the preclusion is of long standing and was reaffirmed and made more stringent in 1970, it is anomalous, and restricts the full opportunity of claimants to vindicate their rights.

In connection with this recommendation concerning judicial review of VA decisions, the Conference has not studied the VA's own decisionmaking processes, but those processes appear to be satisfactory to major groups concerned with them. The Conference does not intend that the judicial review that it recommends should affect the informality and flexibility of the VA's internal procedures.

This recommendation does not address the question of fees for attorney representation before the VA or in court. It assumes that claimants would be able to engage attorneys to make effective the recommended opportunity for judicial review. Congress should consider whether to permit claimants to pay reasonable compensation to attorneys for representation in judicial review proceedings, if such compensation is restricted by 38 U.S.C. §§ 3404(c) and 3405 which in effect limit the fee for representation in a VA benefit claim matter to ten dollars.

Recommendation

1. Section 211(a) of Title 38 of the United States Code, which precludes judicial review of Veterans Administration benefit decisions, should be amended to allow judicial review at the instance of any person adversely affected or aggrieved by such a decision.
2. Judicial review of Veterans Administration benefit decisions should be obtainable by a civil action commenced within 120 days after notice of the decision is mailed to the claimant and any other party to the agency proceeding, or within such further time as the court may allow upon a showing of good cause, in the United States district court for the judicial district in which the plaintiff resides or in the United States District Court for the District of Columbia.

3. Consistent with current practice in judicial review of informal agency adjudication, the administrative record for review should be adduced as follows: The VA would file with the reviewing court, as part of its answer to the complaint, any findings of fact and conclusions of law on which the decision was based and an index of all materials considered in making its decision, or otherwise contained in the VA files on the veteran whose service gave rise to the claim. A copy of the findings of fact, conclusions of law and the index would be provided to the plaintiff. The plaintiff would be permitted to make reasonable requests for production of indexed items that are relevant to the prosecution of his or her case, and the VA would provide either access to or copies of such materials.
4. Review should be on the administrative record thus adduced. The parties would reproduce for the court those portions of the administrative record relied upon by them or requested by the court.
5. The scope of judicial review should be that prescribed in pertinent subparagraphs of 5 U.S.C. § 706(2), that is, subparagraphs (A) through (D). However, regardless of the specific formulation of the scope of judicial review, Congress should make clear that the review statute is not intended to affect the general informality and flexibility of the VA's internal decisionmaking procedures.

AMERICAN BAR ASSOCIATION

STATEMENT OF

FREDERICK DAVIS
DEAN, UNIVERSITY OF DAYTON SCHOOL OF LAW
PAST CHAIRMAN, COMMITTEE ON VETERANS,
SECTION OF ADMINISTRATIVE LAW

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

of the

COMMITTEE ON VETERANS' AFFAIRS

of the

UNITED STATES
HOUSE OF REPRESENTATIVES

concerning

JUDICIAL REVIEW OF DECISIONS
OF THE VETERANS ADMINISTRATION

July 26, 1983

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to present the views of the American Bar Association on the propriety of permitting a veteran who believes himself aggrieved to seek judicial review of a decision of the Veterans Administration.

I am Frederick Davis, Dean of the University of Dayton School of Law, Past Chairman and current member of the American Bar Association's Committee on Veterans of the Section of Administrative Law, and the author of a much cited law review article dealing with the constitutional and administrative problems which arise from a total blackout of judicial review. F. Davis,"Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive' Government'," 39 Indiana L.J. 183 (1964).

The American Bar Association fully supports the basic principle that there should be no absolute and unconditional preclusion of judicial review of allegedly unlawful decisions of the Veterans Administration and also the principle of removing the $10 limitation on attorneys' fees in Veterans Administration cases.

In 1958 the House of Delegates adopted a resolution expressing its support of legislation which would permit judicial review of decisions of the Veterans Administration (Appendix A). In 1975 the House of Delegates reaffirmed that position (Appendix B).

§211(a) of Title 38 of the United States Code presently provides that decisions of the Veterans Administration under any benefits program "...shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

Frankly, the effect of this statutory provision is to put the Veterans Administration above the law in the administration of its benefits programs and in the distribution of benefits authorized by Congress. Because the American Bar Association is committed to the proposition that no one should be above the law, it opposes this restriction.

The only other civilized country which has ever attempted so completely to insulate a bureaucracy from judicial control is England. Although now a discredited practice, for some years Parliamentary draftsmen,in attempting to place administrative regulations above the law, were able to persuade Parliament to insert the following phrase, in enabling statutes delegating power to administrative agencies: "...(A)ll regulations made under this Act shall have effect as if enacted in this Act." Since in England, Parliament is sovereign, English judges were compelled to give those words literal effect, even though they found them distasteful.

A storm of protest led by leading English jurists (e.g., C.K. Allen and Lord Hewart) produced the winds of change which have forced Parliament to abandon such practices. These odious statutory phrases which had put the actions of the bureaucracy above any judicial review or control, and which had been called, not inappropriately, "Henry VIII clauses," are no longer found in England.

Paradoxically, in the United States, §211(a) which, in Henry VIII style, puts the Veterans Administration above the law, still remains in force. How did such a relic from an era of bureaucratic tyranny get into the United States Code, and how has it survived?

This "no review" clause crept into the law as a provision of the so-called "Economy Act" of 1933, a part of which was designed to give the Veterans Administration unrestricted power in the administration of its programs. This was an era marked by what some have called "economic fascism," and which was dominated by the idea that economic stability and progress could be achieved by assigning unrestricted power to economic and administrative groups. Just as absolute control over production and distribution enterprises was to be governed by codes adopted by private guilds under the National Recovery Act (NRA), so, also, the Veterans Administration was to have absolute control and unrestricted discretion in the distribution of benefits. Although the philosophy of that era was abruptly rejected by the Supreme Court when it held the NRA unconstitutional in the now famous case of A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), the no-review provision of the Veterans' Benefits Act (now 38 U.S.C. §211(a)) survives as a monument to the discredited economic philosophy of that era.

It has survived, we believe, in part because the national bureaucracies of a number of veterans organizations have an unrealistic fear that a repeal would weaken their capacities to advise and counsel veterans with service-connected claims.

That fear, we believe, is totally unfounded. Permitting a veteran who believes himself aggrieved to petition the courts for relief would have no significant effect on the internal procedures of the Veterans Administration. Moreover, we believe that the number of veterans who would seek to challenge decisions of the Veterans Administration would be much smaller in number than has been projected. That is because the grounds for rejecting a decision of the Veterans Administration will be significantly limited under the various proposals that have been made and because a significant number of Board of Veterans Appeals decisions do not deal with the decisive issue of basic eligibility, but, rather, with petitions for increases in disability ratings.

The American Bar Association believes that there is no place in American government for a closed system. The Freedom of Information Act and the Government in the Sunshine (Open Meetings) Act represent significant advances in assuring the American people that their government officials are complying with the law. To make the VA answerable in the courts to a legitimately based assertion of unlawful action on the part of the VA would be a similar advance.

Although most judges who have faced challenges to VA benefits decisions have given a literal effect to the no-review clause (see e.g., Hahn v. Gray, 203 F.2d 625, 626 (D.C. Cir.1953): "It was the purpose of that statute to remove the possibility of judicial relief even if the action of the Administrator was arbitrary and capricious..."), recent opinions have hinted that in a proper case involving an egregious interference with a constitutional right, that language might be disregarded. See Johnson v. Robison, 415 U.S. 361, 368 (1974).

It is obvious, however, that our courts are inclined to avoid this constitutional issue if at all possible, and that a ruling on that issue would involve a direct conflict between what Congress has explicitly declared and what the courts believe to be a constitutional limitation. Permitting limited judicial review of Veterans Administration decisions would avoid such an unnecessary confrontation by making it clear that it was never the intention of Congress to put the VA above the law.

One of the most frequently expressed fears of those who are skeptical about the value of judicial review is that it will destroy VA flexibility by establishing precedents which the VA is not free to disregard. This fear is unfounded. Providing for judicial review will in no way prohibit the Veterans Administration from awarding benefits even if such awards may appear to be inconsistent with judicial precedents, nor would judicial review restrict the Veterans Administration's present policy permitting unlimited reapplications of rejected claims.

One writer has predicted a dire impact upon the dockets of the federal courts if review of VA decisions is allowed. A Deputy Assistant Attorney General, appearing before the Senate Veterans' Affairs Committee in the 95th Congress, 1st Session, in 1977, prophesied 4,600 appeals if the VA decision-making process were open to judicial review -- a total increase in cases filed in the federal courts of 3.4%. He based his estimate on appeals from Social Security decisions. The prediction is unrealistic:

1. The number of filings rarely is an accurate measure of drain. Many cases routinely are remanded, or withdrawn or settled for other reasons. Cases decided on the merits may be decided summarily, without trial and with lesser impact upon judicial manpower. J. Mashaw et al., Social Security Hearings and Appeals 129 (1978).

2. VA benefits decisions are not forged in the same trial-type crucible as Social Security benefits decisions, thus providing fewer technical or procedural grounds for judicial appeal. Social Security benefits decisions are subject to the trial-type procedures of 5 U.S.C. §§556 and 557. Judicial Review would not require trial-type hearings in the VA, and none of the proposals before Congress would subject VA decisions to §§556 and 557.

3. Of the 23,000 claims rejected by the Board of Veterans Appeals, 20,000 are rejections of routine appeals made without a hearing. If the claimant did not think his case important enough to seek a hearing before the VA Board, it would not be likely he would retain counsel and go to court.

4. The typical VA-rejected claim does not compare in severity to the typical Social Security-rejected claim. In Social Security, the claimant's disability either prevents him from engaging in a gainful occupation or it does not -- he receives disability benefits or he does not. The vast majority of VA-rejected claims involve upgrading of previously awarded percentage disability ratings.

The veteran either gets a little more money or he continues to receive the amount he has been receiving. The incentive to litigate in the courts is inevitably less.

Finally, it is important to remember what the various proposals before Congress would do, and what they would not do. In the first place they would only permit a veteran to petition a court for review - they would not require a court to readjudicate every claim denied by the Veterans Administration. In this respect it is important to remember that most petitions for review would be denied. Courts, and particularly federal courts, are not hungry for jurisdiction these days. Moreover, the extremely limited grounds upon which Veterans Administration decisions may be judicially questioned under the various proposals before Congress make it clear that it would be only the most obvious and exceptional departure from Congressional guidelines which courts would be moved to review.

In the second place, permitting limited judicial review of Veterans Administration decisions would not, as some have claimed, permit a judicial usurpation of Congressional policy. What limited judicial review would do, however, would be to curtail bureaucratic usurpation of that Congressional policy. If the persons subject to the power of government officials have no right to challenge any interpretations of the law which those officials may make, those officials have a tendency to make up their own law. (See Appendix C). What the officials create may be logically defended as beneficial and proper, but it may still not be what Congress has said the law is.

At the present time the Veterans Administration makes many reports and accounts to Congress and the appropriate Congressional Committees, but there is a growing number of veterans who believe that the Veterans Administration is making low visibility decisions which are totally opposed to what the law requires. Whether these veterans are correct or not, shouldn't they at least be given a chance to ask the courts to take a look? Courts would not be required to take that so-called "look," but under our system of government, that is how we protect ourselves from abusive decisions by government officials - not by requiring courts to review every grievance, but by permitting them to do so if they think that a preliminary showing of illegality is of sufficient strength.

The present system is just plain wrong - and veterans who have encountered it, whatever the merits of their claims may be, know that it is wrong. I know that it is wrong, and I think anyone who has thought long enough about our great Constitutional system of government, and its unique reliance on a system of checks and balances, knows that it is wrong.

The American Bar Association also has been on record since 1977 as opposing statutory provisions which place arbitrary limitations on fees for legal services to be rendered before courts and administrative agencies.

Specifically on point, in August, 1977, the Association's House of Delegates adopted a resolution urging enactment of legislation which would repeal the limit of $10.00 on the fee which an attorney may charge for representing a client before the Veterans Administration and provide reasonable fees for attorneys representing clients before the VA. (See Appendix D of this statement for a copy of the resolution.)

The VA administers a large and complicated system of benefits for veterans (See Appendix C of this statement.) The system operates primarily through the mode of individual application and informal administrative adjudication of disputed claims,without judicial review.

The ABA believes that a person should be permitted to retain an attorney to present his or her VA case if he or she so desires. It is beyond dispute that the current $10.00 limitation effectively prohibits a veteran from retaining an attorney. The ABA believes that the availability of attorneys can play an important role in highlighting areas of vagueness and excessive discretion and in promoting effective presentation of complex claims, e.g., the "service-connection" cases.

A liberalization of the fee restriction is clearly crucial to any meaningful judicial review. If an attorney cannot afford to take a meritorious VA case because of the $10.00 fee limitation, providing for judicial review would be an empty gesture. Lay service organization representatives are prohibited from practicing in district court, and veterans would be reluctant to attempt to represent themselves.

The notion that there is a horde of hungry lawyers avidly awaiting the repeal of the statutory limitations on fees for representing claimants against the Veterans Administration, so that such lawyers can cash in on a lucrative law business, is simply not in accordance with the facts.

The American Bar Association opposes any rule which would require veterans to retain attorneys. We only seek freedom of choice. Specifically, claimants would be able to represent themselves, have a member of a service organization represent them at the administrative level, or hire an attorney.

Some opponents of that policy argue that attorneys would take advantage of veterans. To the contrary, in the complex cases, particularly the "service-connection" cases, an attorney who is trained and skilled in gathering and presenting inconclusive and complex evidence to an administrative agency, and building a record for possible appeal, may be the veteran's greatest asset. Moreover, every state has adopted a stringent code of professional conduct, similar to the ABA's Code of Professional Responsibility, which regulates the attorney in virtually every area of practice.

In conclusion met me say that the American Bar Association fully supports the repeal of prohibitions against judicial review of decisions of the Veterans' Administration, and vigorously supports every American's right to counsel. For this reason the ABA favors the removal of limitations on attorneys' fees.

On behalf of the American Bar Association I want to thank you for the opportunity to present the Association's views on a subject of vital concern to veterans, and of Constitutional significance for all Americans.

Appendix A

RESOLUTION OF THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, ADOPTED 1958 ANNUAL MEETING

Be It Resolved, That the American Bar Association supports the enactment of H.R. 272, 85th Congress, First Session, a bill to permit judicial review of decisions of the Administrator of Veterans' Affairs, with a recommended amendment which would subsitute review in the appropriate United States District Court for review in the appropriate Circuit Court of Appeals and that it authorize the Section of Administrative Law to appear before the committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.

Appendix B

RESOLUTION OF THE HOUSE OF DELEGATES OF THE AMERICAL BAR ASSOCIATION, ADOPTED AUGUST, 1975

Be It Resolved, That the American Bar Association reaffirms its endorsement of the principle of judicial review of the decisions of the Administrator of Veterans Affairs; and

Be If Futher Resolved, That the President of the Association or his designee is hereby authorized publicly to urge enactment of this proposal of law.

EXERPT FROM THE
AMERICAN BAR ASSOCIATION
REPORT TO THE HOUSE OF DELEGATES
ON THE VETERANS ADMINISTRATION

FEBRUARY, 1976

A pervasive problem in the Veterans Administation which attorneys could effectively monitor is the manner in which it determines who will and will not receive benefits. The problem is most critical in the exercise of the VA's discretion as to whether those with less than honorable discharges will receive veterans benefits. From 1964 to 1972, more than 175,000 servicemen were dismissed from the service with less than honorable discharges. Of the various discharges, bad conduct and dishonorable discharges were rare, accounting for no more than 1% of the total discharges. ("Types of Discharges Issued to Enlisted Personnel by Fiscal Year 1950-1972," Office of Assistant Secretary of Defense [Manpower and Reserve Affairs], Aug. 31, 1972.) Such discharges are imposed only by general or special courts-martial. The middle echelon of discharges is the undesirable discharge. Like the honorable and general discharges, it is administrative, but like bad conduct and dishonorable discharges, it may carry heavy penalties in civilian life. Undesirable discharges are given most often for drug use, homosexual acts, conviction by Civilian authorities, and offenses involving "moral turpitude."

Contrary to widespread belief, federal law does not bar the Veterans Administration from dispensing benefits to veterans with less than honorable discharges. The VA is in a position, for example, to extend educational assistance to veterans who, because of a lack of education or training, are perpetually unemployed. But because of the way the VA has applied the law, and the way it interprets its social functions, the agency has not made such assistance available.

Benefits are available by federal law to all veterans who receive discharges "under conditions other than dishonorable." Anyone who receives an honorable or general discharge is unambiguously entitled to benefits. Anyone who receives a dishonorable discharge is unambiguously excluded from benefits, as is someone issued a bad conduct discharge by a general court-martial. Undesirable discharges and bad conduct discharges issued by special courts-martial constitute the "gray area." If a veteran has one of these -- and more than six out of every seven Vietnam veterans with less than honorable discharges do (38 USC 101 (2) -- the VA makes an independent determination of whether or not it was issued under dishonorable conditions. The agency has adopted its own rules on this question. A discharge issued for mutiny, spying, or homosexual acts is automatically considered to be under dishonorable conditions. In addition to the specific categories of discharges that the VA has determined to be under dishonorable conditions, the agency has adopted two rather broad and subjective criteria in its eligibility decisions. A discharge is considered to have been issued under dishonorable conditions if it stemmed from an offense involving "moral turpitude" or was the result of "persistent and willful misconduct." (Starr, The Discarded Army, at pp. 176-177). The determination is made on a case-by-case basis without the assistance of any published and definitive guidelines. The only guideline would appear to be an unwritten presumption that the service imposes less than honorable discharges only for acts of moral turpitude or persistent and willful misconduct, because the VA indicates that 93% of the veterans with less than honorable discharges who applied for educational benefits were denied them. (Letter from Mr. Stratton Appleman, Assistant Director Public Information Office, Veterans Administration, to Raymond Bonner, dated January 18, 1973.)

Ordinarily, the VA keeps no statistical records on benefit applications from vetarans with undesirable and bad conduct discharges. A study of a five month period in 1972, however, noted that only 1,305 applications for educational benefits were received from men with less than honorable discharges. Of these, 91 were approved. During this same period, more than 4,000 veterans with less than honorable discharges applied for unemployment compensation (although the benefits are dispensed by the Labor Department, eligibility decisions are made by the VA). Of the 4,000 men who applied, 3,400 were found ineligible. Ninety-seven of the cases involved veterans with drug-related discharges; six of these were approved. (Starr, The Discarded Army, at p. 179).

The per se rules which the VA has adopted with respect to servicemen with less than honorable discharges appear to be a violation of congressional intent. Some argue that service organizations can adequately protect and represent those allegedly unfairly denied benefits because of less than honorable discharges. It would appear from the statistics herein mentioned, however, that the American Legion, the VFW and other service organizations have not been particularly effective in prosecuting such claims. This is an area ripe for the watchful eye of the attorney in assuring that congressional intent is implemented and those entitled to benefits are treated equally.

The VA's disability program is another area in which the attorney could be quite useful, since the considerable discretion involved in processing disability claims makes the program susceptible to unequal treatment among veterans. For example, a regulation provides that a veteran can be classified as totally disabled if he is "unemployable" and he achieves a certain percentage rating under a rating schedule (38 C.F.C. 4. 16017). The concept of "unemployability," however, as described in the regulations, is rather imprecise, sometimes resulting in a lack of uniformity in practical application. (The regulations define unemployability as "unable to secure or follow a substantial gainful occupation." 38 C.F.R. 4. 16.)

Similarly, in order for the veteran to participate in the disability compensation program, he must have at least a 60% disability on the rating schedule, or two disabilities totalling 70% with one equal to 40% (38 C.F.R. 4. 16). A determination of disability under the rating schedule requires many subjective determinations including the degree of social impairment due to psycho-neurotic disorders. Even in the disability cases where medical disputes predominate, subjective determinations must be made in arriving at the percentage of disability pursuant to the rating schedule, and without the assistance of a trained attorney a veteran may not be able to effectively guard against unequal treatment.

Appendix D

Resolution of the
House of Delegates of the
American Bar Association, adopted August, 1977

Resolved, that the American Bar Association recommends that the Congress adopt legislation:

1. Repealing 38 U.S.C. 3404(c)(2), which limits the fee which an attorney may charge for representing a client before the Veterans Administration to $10.00;
2. Providing reasonable fees for attorneys who represent clients before the Veterans Administration, based on the following considerations:
    (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
    (b) The likelihood, if apparent to the client, that the acceptance of the particular employment, would preclude other employment by the lawyer.
    (c) The fee customarily charged in the locality for similar legal services.
    (d) The amount involved and the results obtained.
    (e) The time limitations imposed by the client or by the circumstances.
    (f) The nature and length of the professional relationship with the client.
    (g) The experience, reputation, and ability of the lawyer or lawyers performing the services.
3. Providing that the client and the attorney shall determine the attorneys' fee, subject to approval by the Administratior of the Veterans Administration and to review by the Federal district in which the claim is processed or in the Federal district court in Washington, D.C.
4. Nothing in this resolution shall be deemed to ammend or modify Resolution #106(G), adopted by the House of Delegates in August, 1976.

VIETNAM VETERANS OF AMERICA
329 EIGHTH STREET NE, WASHINGTON, DC 20002 ★ 202/546-3700

STATEMENT OF JOHN F. TERZANO
LEGISLATIVE DIRECTOR
OF THE
VIETNAM VETERANS OF AMERICA
ACCOMPANIED BY
DAVID F. ADDLESTONE
AND
BARTON F. STICHMAN

BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON VETERANS AFFAIRS

UNITED STATES HOUSE OF REPRESENTATIVES

JULY 26, 1983

Dear Mr. Chairman,

I am John F. Terzano, Legislative Director of the Vietnam Veterans of America. Accompanying me today are David F. Addlestone and Barton F. Stichman, representing VVA's Claims Department. We are pleased to be here today to present VVA's views on Judicial Review.

I. THE NEED FOR JUDICIAL REVIEW IS UNRELATED TO ANY DEMONSTRATION ABOUT HOW FAIRLY THE VETERANS ADMINISTRATION CURRENTLY ADJUDICATES CLAIMS

In an ideal world we would not have to resort to lawyers and the courts. People often file claims because they are in pain, and creating an adversarial situation is not the best way to relieve pain. However, the world is not ideal; indeed it is quite complex. Many statutes and regulations govern veterans benefits programs. Most of these rules were written by lawyers; and as we all know, lawyers often do not make matters as clear as they should.

In the past, some people have begun the discussion about judicial review by asking "what is so wrong with the VA and the BVA that judicial review is needed?" This is not the correct question. The United States has a Supreme Court which is a cornerstone of our democratic and constitutionally structured society. There are also a multitude of other courts and tribunals that are below the Supreme Court and the decisions of which our Supreme Court may review. However, as we all are well aware, the existence of a Supreme Court does not imply the inadequacy, arbitrariness, or wrongness of the lower courts. Nor does the existence of the judicial review imply the wrongness of the other branches of government. The existence of the courts and legal system is merely the way in which disputes are resolved in our society.

Our point, very simply, is that one need not list errors, inadequacies, or other problems at the VA for the purpose of supporting an argument for judicial review. The American system of government uses the judicial system to resolve disputes. Premising the debate about judicial review on a review of evidence about how well the VA handles claims leads to a very serious confusion of the real issues. Tying the debate about judicial review to a discussion of VA flaws causes a labeling of people who favor judicial review as critics or even opponents of the VA. In reaction to this first mistake, people who want to support the agency, in response to the perceived attack, automatically become opponents of judicial review. Thus, people who want to be "friends" of the VA believe they are obligated to oppose judicial review. Unfortunately and unintentionally, these people become the worst enemies of the agency they are trying to protect. This happens because their efforts to prevent judicial scrutiny leads to the belief in the minds of veterans and the general public that there must be something the VA is trying to hide. This chain of reasoning is wrong at every step because it starts with a false premise and continues to build on it.

Unfortunately, the prohibition against judicial review has led to a special status for the VA in the minds of veterans and the public. One product of the prohibition against judicial review is mistrust, suspicion and lack of confidence by many. The VA is seen as an agency beseiged by criticism by the media. Review by the courts would provide an explanation of decision-making and a ventilation of the frustrations of veterans. There can be no doubt that the probition against judicial review has had a negative impact on the image of the VA. Because the agency will necessarily deny the claim of some veterans, it is necessary to provide the opportunity for release of frustration that judicial review provides.

Equating "friend" of the agency to opponent of judicial review and proponent of judicial review to "enemy" of the agency is ill-advised, confused, and in the simplest of terms -- wrong. The legal system is based on the idea that there are different viewpoints and ideas. Attorneys know that as long as there are two lawyers there will be two different points of view. Judges and courts reverse themselves. The law is a fluid process of everchanging ideas, not an inflexible system where right and wrong remain the same. The endless change in the law reflects the changes in life itself and the variety of opinions that each human being has. Those of us who believe in a democratic and free society would want it no other way.

An important benefit of judicial review is that it will result in wider participation by skilled advocates raising different points of view. Judicial review represents participation, diversity and openness. The notion that review is based on differing opinions rather than negative criticism is clearly recognized by the VA system itself. The VA has liberal administrative appeal rights and opportunities for multiple reconsideration of denied claims. It also has a variety of review processes that can take place by Central Office staff before the case goes to the BVA. The VA administrative process is based on the awareness that disagreements and changes of position are possible without anything being wrong with the system or the people in it. Judicial review is consistent with the VA system and its operations and one need not criticize, oppose, or change the VA in order for another protection for veterans to occur.

II. JUDICIAL REVIEW OF THE VETERANS ADMINISTRATION DETERMINATIONS IS NECESSARY TO ALLOW THE AVERAGE VETERAN THE SAME ACCESS TO THE COURTS AS OFFICER AND SENIOR ENLISTED PERSONNEL

The growing number of citizens who advocate judicial review of VA determinations often base their support on the argument that veterans should have equal access to the courts with non-veterans. The reasons that Congress has authorized court review of the actions of almost every federal agency that exists, advocates of judicial review of VA determinations argue, apply with equal force to the VA. Recognition of this fact has moved many veterans organizations who have previously opposed judicial review to change their position and support it now.

The Vietnam Veterans of America has historically supported judicial review of VA decisions for this often -- cited reason. However, VVA believes that an even more important, and often overlooked reason why Congress should authorize court review, is that the current system unfairly discriminates against the average veteran, by allowing court review to upper-income veterans, usually former officers. Little mention has been made before the relevant Congressional committees that in fact many veterans can obtain review of claims for disability benefits related to military service. Entirely separate from the Veterans' Administration program for service-connected disability benefits, the military departments have a Congressionally authorized physical disability benefit program. Like the VA program, the military departments have established agencies to review a veteran's claim for service-connected disability benefits. Unlike the VA benefit system, however, Congress has authorized court review of military disability benefit program determinations.

Whereas the VA disability system treats all veterans equally, the military disability system is tied to rank and base pay. Hence, the military system generally provides vastly greater sums to officers or senior enlisted members for the same disability that a one-term enlisted member will normally present to the VA.

A second area in which some veterans can obtain court review is on the issue of character of discharge. The character of one's discharge is directly related to one's eligibility for veterans' benefits. Those veterans who apply to the VA to establish eligibility based on the character of their discharge pursuant to 38 C.F.R. § 3.12 cannot obtain court review. However, veterans who apply to military, agencies for an upgrade in discharge can go to court for review of these decisions.

We describe these two different systems in more detail below. The point, however, is that veterans who are able to secure attorneys because they have a large claim, or because they are well-to-do, are in fact able to get court review of their claims for veterans benefits. What these veterans do is apply to the military departments for physicial disability benefits or an upgrade in discharge. They may hire an attorney to assist at this stage if they so desire and are not hampered by any statutory fee limitations. If they are denied their claim by the military department, they then file a lawsuit in federal court and obtain court review under the traditional Administrative Procedure Act standard of review.

Thus, a small segment of the veteran population is not denied effective access to the courts. But the large majority of veterans, who cannot afford attorneys who are savvy, and know about court review of military physical disability program and discharge upgrade claims, are completely denied access to court review. They apply to the VA for benefits and they can go no further. They cannot obtain lawyers to represent them at the VA because of the $10 fee limitation, and, if they lose, they cannot seek court review. VVA believes that this disparity of treatment of veterans, favoring higher ranking personnel, is unjust and should be corrected.

A. The Military's Physicial Disability Retirement And Separation Program

Congress has long authorized a system for the military departments to compensate personnel who become disabled during their military service. See 10 U.S.C. §§ 1201, et seq. Basically, if a servicemember incurs a disability as the proximate result of performing active duty or the disability was incurred in line of duty in time of war or national emergency, and that disability is rated at 30% or more, the servicemember is entitled to military disability retirement pay.[1] When a servicemember's disability is apparent during his or her military service, the military departments will refer the member's case to physical evaluation boards to determine whether the person should be retired for physicial disability reasons. However, if the member is discharged without the disability having been reviewed by an in-service board, the veteran may still apply for these disability benefits by submitting an application to a Board for Correction of Military Records (BCMR) established pursuant to 10 U.S.C. § 1552. See Dzialo v. United States, No. 492-80C (Ct. Cl. May 11, 1982)("Where a claimant . . . does not know that he is ill or does not appreciate the serious character of his disability until after he has been separated from the military, application to [a Board for Correction of Military Records] becomes the [appropriate] . . . administrative remedy."); Freedman v. United States, 310 F.2d 381, 392, 402 (1962), cert. denied, sub nom. Lipp v. United States, 373 U.S. 932 (1963).

In order to determine whether a veteran-claimant meets one of the primary criteria for benefits -- whether the disability is 30% or more disabling -- the BCMR uses the standard schedule for rating disabilities used by the Veterans Administration for service-connected disability claims. And, just like the VA, the military departments are required to resolve any reasonable doubt in favor of the claimant. See Reith v. United States, 462 F.2d 530, 536 (1972); Cooper v. United States, 178 Ct. Cl. 277, 316 (1967).

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[1] The rules are more complex than this, but this is a general statement of the eligibility requirements.

Once a final military agency determination on a claim for physical disability retirement pay is rendered, the veteran can seek judicial review in either the United States Claims Court or a United States District Court. The veteran can challenge in court either a denial of disability benefits or a decision to rate a disability that is lower than the veteran believes is appropriate. The standard of review used by the federal courts in such cases is the familiar Administrative Procedure Act standard whether the agency action is arbitrary or capricious, an abuse of discretion, or is unsupported by substantial evidence. See Istivan v. United 689 F.2d 1034, 1037 (1982); Murson v. United States, 401 F.2d 184, 187, 192 (1968); Hutter v. United States, 345 F.2d 828 (1965). When courts review agency decisions on military disability benefit claims, there is often in the record a Veterans Administration decision on the degree of disability the veteran is suffering. The courts are not required to accept this VA determination, although they normally defer to the Veterans Administration conclusion unless there is substantial evidence to the contrary. See, e.g., Hutter v. United States, supra at 831.[2/]

B. The Injustices Perpetuated By Having A Military Disability Benefit Program With Court Review At The Same Time As A Veterans Administration Disability Program Without Court Review

The injustice of having two disability benefit programs which parallel each other, with only one of them susceptible to court review, is apparent. Those veterans who are fortunate

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2/ Another way veterans who hire clever attorneys can sidestep the bar to court review of VA determinations is through a Privacy Act lawsuit filed pursuant to 5 U.S.C. § 552a. The Privacy Act authorizes courts to correct any agency record, including a VA record, which is "inaccurate." See R.R. v. Department of the Army, 482 F. Supp. 770 (D.D.C. 1980); White v. Civil Service Commission, 589 F.2d 713 (D.C. Cir. 1978), cert. denied, 444 U.S. 830 (1979); Turner v. Department of the Army, 447 F. Supp. 1207, 1213 (D.D.C. 1978); aff'd mem., 593 F.2d 1392 (D.C. Cir. 1979). Thus, a veteran who can convince a

[footnote 2 continued on page 8]

enough to know of the dual systems and who can afford to hire attorneys familiar with the dual systems can get court review of their cases. Other veterans -- the large majority -- cannot get court review. They apply to the better known Veterans Administration compensation program. Many of them believe their claims are unjustly denied and that a court would overturn the VA's determination. But they cannot go to court.

Take the case of Norman Elmore Cooper, Jr., a former member of the Navy. Two years after he was discharged from the Navy, Mr. Cooper applied to the Veterans Administration for service-connected disability benefits. The VA granted his claim in part, rating him 20% disabled for an ulcer condition, but denying any disability rating for his alleged mental impairments. See Cooper v. United States, 178 Ct. Cl. 277, 304 (1967). Mr. Cooper, however, believed he was entitled to a much higher disability rating. He knew that no court review of VA determinations is permitted, but that court review of military physical disability determinations are permitted. Therefore, he hired an attorney who applied to the BCMR for physical disability retirement pay. That Board, like the VA, denied Mr. Cooper's claim for a disability rating higher than 20%.

Because a military agency, and not the VA, had made this determination, Mr. Cooper could now go to court. He sued the Navy, arguing that he was entitled to a higher disability rating. In a long and well-reasoned opinion, the federal court agreed. The BCNR's decision was, in the court's opinion, arbitrary and capricious and unsupported by substantial evidence. Therefore, the court ordered the veteran's disability rating to be increased to 40%. Id. at 317.

[footnote 2 continued from page 7] federal court that a VA diagnosis is "inaccurate" can get this diagnosis corrected. When the veteran thereafter re-applies to the VA for benefits, the VA will be bound by the court-ordered diagnosis. Id.

There are few attorneys who know about the availability of the Privacy Act to help win a VA claim, however. Also, relatively few veterans can afford lawyers to bring such collateral lawsuits.

It is plain that most veterans do not know about this loophole to allow court review. The point, of course, is not that court review should be eliminated for military agency determination on disability claims. As the court decision cited above demonstrates quite plainly, these agencies sometimes make mistakes -- quite egregious mistakes -- which have a great impact on a veteran's life. Courts are available to overturn these infrequent, but important errors of administrative justice. But this remedy for occasional agency mistakes is not available to the majority of veterans who do not have large enough claims or enough money to hire attorneys familiar with the military disability benefit program and court review thereof.

C. The Dual System Of Character Of Discharge

We have discussed above the inequities resulting from a dual system of service-connected disability benefits -- one allowing court review and one precluding court review. The VA, of course, provides other types of benefit programs. A dual system exists for those benefit programs as well -- one allowing for court-review and one prohibiting court review. This relates to the character of discharge.

Congress has long provided that for a veteran to be eligible for any of the panoply of veterans benefits administered by the Veterans Administrations, including but not limited to their service-connected disability benefits, a veteran must have been discharged "under conditions other than dishonorable." 38 U.S.C. § 101(2). When a veteran applies to the VA for benefits, and s/he has a less than General Discharge and was not discharged for a reason that constitutes a statutory bar, the VA makes what is known as a "character of discharge" determination. In such a case, the VA determines whether the circumstances surrounding the veteran's military service are such that he should be considered to have been discharged "under conditions other than dishonorable."[3/]

[3/] The rules are more complex than this but this is an accurate general description of the process. See 38 C.F.R § 3.12.

As all other VA determinations, courts cannot review a VA's decision that a particular veteran's discharge was "under other than dishonorable conditions." However, a veteran can "overturn" the VA determination through the military departments, just as he can in the service-connected disability field. Specifically, the veteran can apply to a Discharge Review Board (DRB) and/or Board for Correction of Military Records for an upgrade in discharge. And because court review of DRB and BCMR decisions have been available for decades, if these boards deny him an upgrade in discharge, the veteran can seek court review. And, if the veteran wins in court, the discharge will be upgraded to General or Honorable. Then the veteran can return to the Veterans Administration with an upgraded discharge, and the Veterans Administration is bound to reverse its previous determination that the veteran was discharged "under conditions other than dishonorable." Accordingly, a veteran using this route can become eligible for veterans benefits.[4/]

The case of former Chief Warrant Officer Raymond E. Robinson illustrates this convoluted route to justice. Robinson resigned from the Army after lengthy service but a short AWOL brought on by family and emotional problems. He was issued a discharge under other than honorable conditions. Mr. Robinson's resignation letter stated that "I further understand that if my resignation is accepted under other than honorable conditions . . . I may be barred from all rights . . . under any law administered by the Veterans Administration. . . ." Robinson v. Resor, 469 F.2d 944, 947 n. 4 (D.C. Cir. 1972).

Knowing that there was no court review of VA determinations, Robinson made repeated efforts before the Army DRB for an upgrade in discharge. Id. at 945. When these efforts failed, Robinson hired an attorney and sought court review. The Court of Appeals for District of Columbia Circuit unanimously held that the DRB's decision denying him an upgrade in discharge was arbitrary and capricious. The court stated that the Army's actions against Robinson "viewed in its entirety, constitutes an overreaching leap into the arbitrary and inequitable."

[4/] An upgrade by a DRB in some cases does not confer eligibility for VA benefits.

The Court went on to state that the "Army could not isolate itself from the accepted standard of justice in the civilian world when it was a conscript force; still less can it -- or should it wish to -- live by a different standard when it plans to become an all volunteer Army. Until it is fairly set right, the case of Chief Warrant Officer Robinson will be no boon to recruiting Sergeants."

The result of Robinson's court action was a discharge under honorable conditions. This type of discharge binds the Veterans Administration to treat him as a veteran eligible for veterans benefits. If, however, he had tried to seek review of a Veterans Administration determination on his character of discharge, the court would have summarily dismissed his lawsuit because of the preclusion of judicial review of VA determinations.

This dual system of determining the appropriate character of discharge plainly leads to the same inequities as the dual disability programs. Veterans who can afford the services of a lawyer can obtain court review through the convoluted and long process of seeking an upgrade in discharge from a DRB and BCMR, and, if they fail at those Boards, seeking court review. It took Mr. Robinson some seventeen years from the date of his discharge for a court to force an upgrade in his discharge. But, finally, he was able to obtain an upgrade in discharge and eligibility for veterans benefits. A speedy, more efficient system of justice available to all veterans would exist if Congress were to allow direct review of VA determinations by the courts.

III. JUSTIFICATION FOR CURRENT SYSTEM

What justification is there for treating veterans benefit claimants diferently than prisoners, public assistance recipients, Social Security pensioners, DRB or BCMR applicants and practically everyone else who has a dispute with the government? The traditional justifications and the position of the current VA Administrator include the following:

- No one has proven that anything is wrong with the VA system. In other words, "If it ain't broke, don't fix it."
- Judicial review would interfere with the day-to-day working of the VA.
- It would be costly.
- It would disrupt a smooth, informal and non-adversarial system.
- Claimants would need lawyers.
- The Board of Veterans Appeals (BVA) should be the final arbiter of technical questions of veteran's law.
- The courts have no expertise in these matters.
- The courts would render non-uniform decisions.
- The VA system is so replete with safeguards, and free counsel is available to work closely with this system, that a sort of "generalized due process" makes up for any deficiencies.
- Judicial review of Social Security disability claims has flooded the courts and caused the reversal of 25% of the administrative decisions.

These arguments are presently without factual support and when examined in the final analysis they are based on myths.

A. The Myth That The VA Will Deny More Claims And Not Give The Veteran The Benefit Of The Doubt If There Is Court Review

A major argument against judicial review by those who continue to argue for the perpetuation of a system which gives veterans fewer rights than other citizens is the suggestion that judicial review will cause some great harm. But this harm is never made specific. We have heard that it would cause the loss of informality at the VA that allegedly benefits the veteran. Many administrative bodies allow for hearings and all of these bodies have their decisions reviewed by courts. The proceedings are in no way more formal or adversarial than those of the BVA. None of them is more adversarial or formal just because the courts are permitted to review each of them.

No specifics of how judicial review impacts negatively on this process have been offered. No one offers a specific instance where more formality would hurt veterans. Reference to Social Security Disability cases is misplaced because that is an adversarial system with many technical procedures.

Another way this argument is phrased is that if judicial review is permitted the VA would no longer give the veteran the benefit of the doubt and would actually deny more claims than they do now without a system of judicial review. The military disability benefit program demonstrates that this argument is a myth. In the military disability benefit program, the military agencies, just as the VA, are required to resolve all issues on which there is reasonable doubt in the veteran's favor. See Cooper v. United States, supra at 313-316; Reith v. United States, supra at 536. At the same time, courts review military disability determinations. Thus, the fact of judicial review can certainly live coextensively with a requirement that agencies resolve all reasonable doubts in favor of a veteran.

B. The Myth That Courts Do Not Have The Expertise To Review Disability Claims

Another argument advanced by opponents of judicial review is that federal courts do not have the expertise to review an agency's determination on such specialized areas as whether a veteran has a service-connected disability. This argument is also a myth. Federal courts have for decades reviewed the most complex of agency actions. The question of whether a veteran has a service-connected disability is a rather simple type of issue.

Again, reference to the military disability program helps debunk this myth. As discussed above, military disability claims are controlled by the rating schedule that the Veteran's Administration uses for disability claims made to the VA. In reviewing military agency determinations on claims for disability, the federal courts are called upon to interpret this VA schedule. The federal courts, which refer to the VA schedule as "the bible for ratings" (Reith v. United States, supra at 536), have for decades interpreted and applied this so-called complex set of guidelines. There is nothing extraordinarily complex about these guidelines, and the courts have shown over the decades that they have substantial expertise in reviewing agency determinations on these matters.

Some of the opponents of judicial review make a large issue of leaving the BVA as the sole expert and final arbiter of technical questions of veterans' law. This overlooks the fact that the BVA currently is not the final arbiter of such matters.

Section 4004(c) of Title 38 U.S. Code provides:

> The Board [BVA] shall be found in its decisions by the regulations of the Veteran's Administration, instructions of the Administrator, and the precedent opinions of the chief law officer [Office of General Counsel].

Thus, it is quite clear that unpopular BVA decisions can be nullified through a variety of VA procedures.

C. Allowing Court Review Of VA Determinations Will Result In A Flood Of New Lawsuits

Another argument against judicial review of VA determinations is that it will result in a flood of federal court lawsuits, thereby adding to the already overburdened federal court docket. Reference to the military disability benefit program makes plain that there is little substance to this argument. In the many decades since Congress established the military disability program, relatively few veterans have sought court review. The reasons are apparent; attorneys will not represent these claimants unless they have a good enough claim on the merits to permit the attorney to take it on a contingency basis.

If court review of VA determinations is permitted, the number of federal court cases is likely to be relatively small if the track record on court review of military disability program decisions is any indication.

The early rush to the courthouse that will occur after passage will abate after the Courts begin to define the limits of relief available. Examples can be seen in the review of decisions of the DRBs and BCMRs. These agencies handle tens of thousands of cases a year; and fewer than 100 cases are pursued in federal court. Because 20,000 of the 23,000 BVA annual "appellants" do not request a hearing, resort to the courts by many is unlikely.

In fact, the introduction of judicial review and lawyers into the VA adjudication process will actually have positive effect on the VA caseload. The VA is so generous in its granting of rehearings that many disgruntled veterans reapply every year at great expense to the VA. In our experience, once a would-be-litigant is rejected by enough lawyers who bluntly say "you have no case," they cease their unproductive efforts. The same is even more true for the litigant who loses in Court. Thus, judicial review would provide two avenues to stop frivolous re-adjudication of many claims.

The elimination of the current criminal penalty for charging more than ten dollars for representation of a veteran before the VA will also tend to weed out frivolous litigation. The entry of attorneys at early stages of a VA case would likely provide many veterans with the answer thaty "you have no case" before a federal court complaint is filed precipitiously just to make the filing deadline.

In sum, VA believes that judicial review would make the BVA more cautious in its decision-making to a beneficial degree and more importantly give the BVA more authority to control the often inconsistent and uncontrolled decision-making of the regional offices. This is the unofficial view of many past and current members of the BVA.

D. The Remaining Myths

The rest of the arguments against judicial review -- cost, the need for lawyers, non-uniformity of decisions, generalized due process of the system is sufficient -- are dealt with in the following sections. But we feel constrained to say that if judicial review won't hurt the system, such a cost-benefit analysis is like saying "we won't give you a fully loaded weapon because studies have shown bullets get lost that way."

IV. THE SCOPE OF REVIEW OF VA DETERMINATIONS

In the past few years there has been much debate over the appropriate scope for review if Congress were to allow judicial review of VA determinations. Much of the debate has centered upon whether courts should be authorized to make determinations on issues of fact, as well as issues of law. All those who believe judicial review is appropriate support court review of issues of law. More disagreement exists on whether court review should be allowed on issues of fact, and if so, what scope of review of issues of fact is appropriate.

The Bill recently passed by the Senate attempts to create a wholly unique articulation of how courts are to treat VA determinations on issues of fact. The Vietnam Veterans of America opposes the creation of unusual standards of review on factual issues. The traditional scope of review of agency action provided by the Administrative Procedure Act, 5 U.S.C. § 702, *et seq*., is, VVA believes the appropriate standard of review on all issues. Congress has authorized courts to overturn agency action which courts find to be "arbitrary, capricious, and abuse of discretion" or "unsupported by substantial evidence." 5 U.S.C. § 706.

That this is the appropriate standard of review is made apparent by referring to military physical disability and discharge upgrading claims. As mentioned above, these military agency determinations are reviewable by federal courts under the familiar arbitrary and capricious and unsupported by substantial evidence standard of review. Courts have reviewed these determinations for decades under this standard of review. An analysis of those court decisions which overturn military agency disability determinations makes plain that the large majority of decisions are based upon issues of fact, rather than issues of law. In other words, the military agencies rarely misapply the law, because they have been interpreting the basic regulations on military physical disability claims over and over again. Where they occasionally make errors is in evaluating the evidence. Sometimes, these agencies' determinations denying benefits are so unsupported by the evidence that courts feel compelled to overturn their decisions in order to provide justice. When they overturn such decisions they do so because of the arbitrary, capricious and unsupported by substantial evidence standard.

This same just system should apply to reviewing VA determinations. As in the military disability system, mistakes will most often be made, when they are made, on issues of fact. To allow judicial review of issues of law, but not on issues of fact, will not provide veterans with much of a court remedy. They will still be best served by avoiding the VA disability and discharge evaluation system and by applying instead to the military agencies in order to obtain court review of determinations on issues of fact. Plainly both systems should have the same scope of review in order to provide equal justice to all veterans.

Recently the Supreme Court noted the standard of review given to military agency determinations, and affirmed it as the appropriate remedy for veterans who have been caused injury during their military service. The Court stated

> The Board for Correction of Naval Records . . . provides . . . [a] means with which an aggrieved member of the military "may correct any military record . . . when [the Board] . . . considers it necessary to correct an error or remove an injustice" 10 U.S.C. § 1552(a). . . . Board decisions are subject to judicial review if they are arbitrary, capricious or not based on substantial evidence.

Chappell v. Wallace, 51 U.S.L.W. 4733, 4735 (June 13, 1983).

VVA believes this standard is the appropriate one for fact review of VA decisions as well.

S. 636, as reported created a new standard for fact review: the decision is "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if it were not set aside." The basic reason we propose the substantial evidence standard is to avoid the creation of new problems for courts and the VA that would result from a review using an unfamiliar standard. Courts are familiar with the substantial evidence test, and it is used to review actions of other agencies not formally subject to the APA adjudication requirements. In reviewing VA decisions, this standard could be easily applied by the courts.

While there is a significant body of opinion that the substantial evidence test and the arbitrary and capricious test are in reality different ways to say the same thing about judicial review of informal decision-making, we feel that as a practical matter factual review using the substantial evidence that is more manageable and would in the long run work to the benefit of more veterans. This becomes clear when one looks at how the average judge and the average attorney face an individual veteran's case. Most small practitioners are not terribly sophisticated in the verbal slight of hand in proving what is arbitrary and capricious much less the finer aspects of making review of fact look like review of law. In our view, the average attorney would have an easier time in analyzing facts within the framework of what evidence is substantial enough to support a factual finding. Hence, veterans would be more likely to find low price or free assistance if highly honed skills of legal semantics are not required.

If review were limited to questions of law, the judicial review practice would be limited to those attorneys highly specialized in administrative law and the art of making questions of fact into questions of law. We feel that it would be undesirable to encourage the isolation of such a practice of law, because veterans are fairly evenly distributed throughout the country and these type attorneys are more likely to be found in large firms in big cities. (For this and other reasons VVA opposes the creation of a specialty Veterans Court to sit in Washington, D.C.) The average practitioner doing a favor for a brother-in-law or a fellow vet would thus be discouraged from trying to weave and dodge to turn fact situation X into a "denial of due process."

While some people may argue that there is no need for factual review until it is proven that there is such a need, all we can say is that it is an unfortunate state of affairs if veterans are the only class of citizens against whom the "presumption of bureaucratic correctness" is invoked. Every bureaucratic action affecting any corporation can be challenged in court; prisoners get court hearings with ease; public assistance recipients are entitled to federal court review; and bad paper veterans denied relief by a DRB and BCMR can seek federal court review on questions of fact.

V. THE ATTORNEY FEE LIMITATION

VVA urges the Congress to take action to eliminate the ten dollar fee limitation that attorneys may charge to handle VA claims. The limitation deprives veterans of a basic right that all citizens have -- the freedom of choice to seek professional assistance to help them sort through a complicated legal system. They should have the opportunity to go into the marketplace and pay for the legal services they need, without the statutory barrier that lingers from another historical era and set of circumstances. There can be no doubt that the ten dollar fee limitation acts to almost completely exclude lawyers. It is a perfect example of inappropriate and unnecessary government regulation to deny citizens a free choice in the market place.

The retention of the limitation is usually justified by reference to some generalized negative effect lawyers would have on the VA.

Some believe that removal of the fee limitation and the introduction of lawyers into the VA system would harm the VA's decision-making process. Arguments against such representation suggest that lawyers would unnecessarily complicate the process, create an adversary relationship between veterans and the VA, and that simply suggesting the notion of lawyer representation before the VA is an indictment of the current adjudication system.

Taking the last point first, to suggest that lawyers should be able to represent veterans who want lawyers before the VA does not mean that the current system is either unfair, indifferent or a failure. On the contrary, the right to choose a representative does not depend on any shortcomings of an adjudicative system. Rather, the right to seek legal assistance should stand alone as an option for all citizens. The ten dollar fee limitation serves as a barrier to lawyers created by government regulation. Eliminating the prohibition would open the system to more free choice and a free market.

VVA sincerely believes that the introduction of lawyers and other legally trained professionals into the VA will improve the system. There are several specific benefits we feel that lawyers can add to the system. Let it be clear, -- however, we are not advocating the replacement of service organization service representatives with lawyers. We are advocating that veterans receive the benefit of an additional option.

The most important function lawyers can serve at the VA, as they have at other federal agencies, is that of mediator between the veterans and the agency. The typical lawyer who advocates before an administrative agency does not fit the stereotypical image of adversarial trial-type litigator, the image created by some who oppose lawyer participation at the VA. Persons familiar with federal agency practice know that the role of an administrative advocate is far different from a courtroom litigator. The administrative lawyer frequently acts to explain a complex agency to a client, attempts to clarify issues for both the client and the agency, and tries to resolve claims with as little acrimony as possible. The reason why lawyers would function this way is obvious. The VA is not an adversary process, and there is no attorney on the other side to argue against.

An even more telling point against the argument that lawyers will somehow infect the system is to look at the BVA itself. The BVA has fifteen sections each with three members. Fourteen of the fifteen sections have two of the three members who are lawyers. In the fifteenth section all three members are lawyers. In addition, each section has seven or eight staff attorneys. In short, the entire decision-making process is monopolized by attorneys. Everything is done in legalistic terms. To argue that allowing the veteran to have a lawyer will infect the process with legalism ignores the reality of the process as it now exists.

Lawyers have been trained to approach issues in a certain way and that method is used to adjudicate issues at all federal agencies and in the courts. We have been told that the presentation of briefs to the BVA, which we do in every case, has helped the members better understand the legal issues and the factual record. Given the incredible caseload at the BVA, clarification of issues will assist the BVA and at the same time give the veteran informed access to the system.

There is another result from the introduction of lawyers that will be beneficial to veterans and the agency. It is common to all lawyer-client relationships, and that is when a lawyer advises a client that he or she does not have a meritorious case. We have found that providing a client with frank advice about the chances of success is welcomed by the client who never before knew the real merits of the case. This is not to say that disgruntled clients will not seek another, more favorably inclined lawyer but the point bears consideration. In this way, lawyer participation could significantly reduce the caseload of the agency on grounds that are sound and in a manner that leaves the client with a sense that a full and fair consideration by an independent professional has been given in the case.

S. 636 and the House bills still place unduly strict limits on attorneys fees. For example, some provisions keep the ten dollar limit until the VA process has been exhausted, and the limit for court work is still unrealistically low. VVA feels that these provisions, while a welcome change from the past, are not sufficient to assure that veterans will have the freedom to choose their own representative and have legally trained counsel assist in making an early record for cases that are likely to end up in court. We would be happy to assist the Committee staff revise these provisions.

Thank you.

Veterans Due Process, INC.
P.O. BOX 68237 PORTLAND, OREGON 97268-0237
(503) 659-9912

TESTIMONY OF

PHILIP E. CUSHMAN

EXECUTIVE DIRECTOR

VETERANS DUE PROCESS, INC.

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

JUDICIAL REVIEW OF VETERANS ADMINISTRATION DETERMINATIONS AND TO PROVIDE FOR REASONABLE ATTORNEYS FEES IN ADMINISTRATIVE APPEAL HEARINGS

JULY 26, 1983

Veterans Due Process, Inc.
P.O. BOX 68237 PORTLAND, OREGON 97268-0237
(503) 659-9912

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to appear today to present the views of VETERANS DUE PROCESS, INC. (VDP) concerning Judicial Review of the Veterans Administration (V.A.), and the elimination of the ten dollar fee limitation which effectively denies veterans the free choice to hire professional legal counsel. I am Philip E. Cushman, the Executive Director of Veterans Due Process, which is a national non-profit veterans rights organization, dedicated primarily to the restoration of the basic constitutionally guaranteed right of DUE PROCESS OF LAW to America's battle-injured veterans. This organization is comprised of veterans of World War 1, World War 11, Korea, Vietnam, and other concerned American citizens. Our active leadership are, for the most part, combat veterans.

For the past few years, VDP and its predecessor concerned citizens, have been very concerned by the condition of "veterans rights." As we have indicated in previous letters to the House Committee on Veterans' Affairs, and to each of the members of the entire Congress, our primary concerns are as follows:

1. The fact that existing statute law closes the doors of every court of law in America to veterans who wish to appeal a wrongful or illegal decision of the V.A., to a fair and IMPARTIAL court of law. (38 USC 211a)

2. The fact that veterans are presently denied the right to counsel by existing statute law, which makes it a crime for an attorney to charge a veteran more than $10.00 for total services rendered. Any attorney who violates that law can be sent to prison for 2 years at hard labor. (38 USC 3404,3405)

3. Veterans are denied the protections of the Administrative Procedures Act of 1946 (APA), which was enacted in order to protect the rights of American citizens from being VIOLATED by agencies of the federal government. (60 Stat 237, 5 U.S.C.A.). The V.A. has been EXEMPTED from having to comply with the APA. (320 F2d 455; 84 S Ct 675; 117 F. Supp 842; etc.)

4. Should a veteran who has been wrongfully or illegally denied benefits to which he or she is entitled by law, be successful in convincing "ANY" other official of the United States that an injustice has occurred, and seek that officials intervention in his V.A. case, that official will probably soon learn that existing V.A. law will allow "NO OTHER OFFICIAL" to have power or jurisdiction to "REVIEW" any decision of the Administrator of the V.A. (38 USC 211a)

In summary, America's battle-injured veterans are not only denied the right to appeal their cases to a fair and IMPARTIAL court of law, but are also denied the right to counsel, the protections of the APA, and help from any other official of the United States. The V.A. is allowed to sit in final judgement of its own decisions. It has total discretion, total impunity, and absolute power. It cannot be required to defend its decisions.

Veterans Due Process considers this situation to be an unconscionable deprivation of basic DUE PROCESS OF LAW rights, which the Constitution of the United States guarantees to every American citizen. I am not an attorney, but I know that the concept of Due Process of Law, in the final analysis, means "FUNDAMENTAL FAIRNESS" or expressed differently, respect for that feeling of just treatment, ENFORCED BY LAW.

It is common knowledge that the FIFTH AMENDMENT to the Constitution provides that "nor (shall any person) be deprived of life, liberty, or property, without Due Process of Law."

One of the attachments to this testimony, entitled "COMPARATIVE LEGAL RIGHTS," serves as a very effective visual aid, which this organization routinely utilizes in order to explain this mockery of justice which victimizes America's veterans. That fact sheet, emphasizes the fact that claimants with other agencies of the federal government, such as Social Security, have access to appeal decisions of the agency to a fair and impartial court of law, and the right to hire an attorney. It also indicates that people with workmans compensation claims and welfare cases also enjoy those protections. It is interesting to note that illegal aliens (non-citizens) are protected by Due Process of Law.

Our high regard for justice as a nation, carefully and judiciously protects the rights of murderers, rapists, thieves, traitors, spies, assassins, terrorists, etc. Ironically, however, veterans who have been injured in battle, defending the rights of every other citizen, are denied the protections of the law afforded to every other group on the list.

Can it be that battle-injured veterans are somehow less entitled to the protections of the Constitution of the United States simply because they were injured in its defense? We don't think so! VDP does not seek any preferential treatment under the law for veterans, just the same rights enjoyed by the rest of the American people.

With increasing frequency, the American people are hearing sad news reports about the plight of the "Atomic Veterans" or "Agent Orange Veterans" as well as other injustices to veterans. In response to that fact, and the fact that the problems of the "Veterans Community" are often perceived as being very numerous, we at VDP launched an effort in order to inform the veterans community and the American people, that the vast majority of the seeming "MYRAID" of veterans problems and complaints concerning decisions of the V.A., all have a COMMON DENOMINATOR, which is, of course, the fact that veterans are denied a fair chance at justice---DUE PROCESS OF LAW.

Due process of law now appears to be the cohesive force which is uniting America's veterans, and veteran's organizations. They are directing their attention away from the "SYMPTOMS" of the problem and are joining in the common denominator which can assure fairness and a chance for justice, to them all. The formerly fragmented and consequently often ineffective individual veterans organizations, are increasingly demanding the right to be allowed to share in the protections of the FUNDAMENTAL LAW--the Constitution--which they fought and were often injured defending. Tragically, the survivors of those who made the supreme sacrifice on the field of battle, can also be victimized by these UNFAIR laws.

Last year, Veterans Due Process contacted the leading Vietnam veterans organizations across our nation, and asked that they join us in a meeting to be held in the United States Capitol on November 10, 1982, in order to isolate the common denominator of the majority of veterans problems with the V.A. as being the fact that veterans are presently denied Due Process of Law, and thus relegated to second class citizenship.

Those assembled organizations, known as the "VIETNAM VETERANS ORGANIZATIONS UNITED" (VVOU), met on that date and adopted a RESOLUTION (copy attached to this testimony) calling upon the Chairman and the members of the House Committee on Veterans Affairs to report, and for the full membership of the House of Representatives to approve the pending legislation providing for Judicial Review of V.A. decisions adverse to the veteran. VDP also invited all of the other veterans organizations in America, as listed in the official V.A. directory, to attend the meeting, join with us, and sign the Resolution. Many other organizations sent representatives and the Air Force Sergeants Association signed the Resolution. It was that historic meeting and Resolution, which marked the beginning of the restoration of Due Process of Law for America's veterans.

I will never forget during that meeting in the Capitol, when a representative of one of the large veterans organizations came up to me and said:

> "WE HOPE THAT YOU ARE SUCCESSFUL IN YOUR EFFORT TO BRING THE V.A. UNDER CONTROL OF LAW, BECAUSE THE SYSTEM AS IT PRESENTLY EXISTS, IS A SYSTEM WHICH CAUSES MEN TO BETRAY THEIR OWN SOULS."

I have listened to V.A. employees tell me the same thing, only in different words.

On the morning following the meeting of the VVOU in the Capitol and the adoption of the Resolution, I arranged for a press conference for the VVOU, in the Russell Senate Building, in order to focus attention on this problem, and on the efforts of America's Vietnam veterans organizations and some of our friends in Congress (as well as other concerned citizens) to bring about the needed change to the law.

I was very honored to be joined at that press conference by Senator Gary Hart, Congressman Tom Daschle, Congressman Ron Wyden, and Fred Davis (the Dean of the University of Dayton Law School), who all spoke out against this injustice. Senator Hart, while mentioning the dedication of the Vietnam Veterans Memorial which also took place in Washington D.C., that week, indicated that in addition to a memorial in stone to the Vietnam veterans, that it would be difficult to envision a more meaningful memorial to veterans, than a "MEMORIAL IN LAW" to restore their Due Process of Law rights under the Constitution of the United States, which they fought to protect. This organization is in total agreement with Senator Hart, and is very thankful to him for his long fight in order to enable veterans to regain their rights under the law.

During the past year, representatives of VDP have been telling the story of the lack of veterans rights, to the American people from coast to coast, and also to our nations veterans. Perhaps one of the most incredible aspects of this problem is that the American people have no knowledge that this situation exists, and of the potentially devastating effects which it could have on the lives of their loved ones -- husbands, sons, brothers, etc. We have found that our fellow citizens are shocked when they learn about this matter, as are our brother and sister veterans. The American people ASSUME that veterans have the protections of the law which they fought to protect for all other citizens, but they are under an illusion.

Many citizens are reluctant to believe this story when we tell them, and we therefore carry copies of Title 38 U.S. Code, in order to let them read the laws, and thus dispel any doubts in their mind. We are often asked: "HOW CAN THIS POSSIBLY HAVE BEEN GOING ON FOR 50 YEARS WITHOUT US KNOWING ABOUT IT?" Some people have suggested to us that there is a "MEDIA BLACKOUT" concerning this situation, but we tell them that regardless of the nature of the problem, that they should simply work to correct it, by passing this information on to their families and friends across the country, and ask them to also get involved and pass the word. The peaceful process of democratic government in the hands of dedicated citizens, can solve this problem, and restore rights to veterans.

Also testifying before this hearing today is Mr. Fred Davis, who was previously mentioned in this testimony. I have known Mr. Davis for several years, and know that he has been involved in the issue of judicial review of the V.A. for over 20 years. His concern is that of a legal scholar over the principles involved, and I am proud to call Mr. Davis my friend. During 1978, Mr. Davis prepared a report for the ADMINISTRATIVE CONFERENCE OF THE UNITED STATES entitled JUDICIAL REVIEW OF BENEFITS DECISIONS OF THE VETERANS ADMINISTRATION. Contained within that report are a number of examples of cases where claims for judicial review were strong, and it is recommended that this Committee review that report and said examples of abuse as additional evidence of the need for judicial review. As but a small indication of the reason why this recommendation is made, is a portion of a letter which appears in APPENDIX F, from a Mr. Norman Johnson, a former staff legal advisor to the Board of Veterans Appeals (P.788, hearing report):

> "I want to leave you with one final example of B.V.A. attitudes: I once drafted and dictated an appeals decision granting service connection status for a black, Korean action veteran. The elements of the case were clear - his induction physical examination report indicated normal feet. The separation physical indicated "pes planus" or flat feet, not an unusual development over the course of Army service and one that can be painful and limiting for all of the jokes that are made of it. The facts and the law were clear, but the decision was returned to me with instructions to deny the claim.
>
> I found it difficult to evade the letter of the law and I considered it dishonest to arbitrarily deny the facts in order to reach the decision my supervisor desired. I asked the section chairman why the decision was to be a denial. He explained that it was because the veteran was black and all black people eventually get flat feet. It was a "racial characteristic" I now wonder how many decisions were written or decided by that man in his thirty-odd years with the Board of Veterans' Appeals?"

Judicial Review could certainly have had a bearing on that situation.

I would also like to direct the attention of the Committee members to the case of Private Leroy Baily, which appears at the bottom of the attached "COMPARATIVE LEGAL RIGHTS" sheet. I could sit here all day and cite cases of V.A. abuse of which I have read, heard about, or discussed with veterans. VDP, for the most part, does not become involved in individual veterans cases, or their relative merit. It is simply our contention that if a person who has been injured defending the Constitution, believes that he has been wrongfully or illegally denied that to which he is entitled by law from the V.A., that he has earned the right to a fair and IMPARTIAL and MEANINGFUL appeals process, with professional counsel at his side, if he so chooses.

During 1981, situations such as that described in the "Norman Johnson" letter (quoted in part above), caused me to think seriously about Article VI of the United States Constitution, section 2, which appears in part as follows:

> "THIS CONSTITUTION, AND THE LAWS OF THE UNITED STATES WHICH SHALL BE MADE IN PURSUANCE THEREOF. . . SHALL BE THE SUPREME LAW OF THE LAND. . ."

Section 3 of Article VI appears in part as follows:

> ". . .ALL EXECUTIVE AND JUDICIAL OFFICERS, BOTH OF THE UNITED STATES AND OF THE SEVERAL STATES, SHALL BE BOUND BY OATH OR AFFIRMATION TO SUPPORT THIS CONSTITUTION. . ."

It occurred to me that the B.V.A. section chairman mentioned in the "Johnson" letter, and Johnson himself, were quasi-judicial officers of the United States Veterans Administration, and held office under the authority of the United States, and therefore should have been required to not only take an oath to support and defend the Constitution, and bear true faith and allegiance to it, but would consequently be bound by Section 2 of the Constitution, which is, in my opinion, a mechanism placed in the Constitution by the founding fathers, in order to protect the Constitutions integrity. It is our opinion that said section of the Constitution places a responsibility upon all judicial officers of the United States (quasi or not) to ask of themselves a question concerning the laws which they are tasked to enforce. That question is:

IS THIS LAW OF THE UNITED STATES IN PURSUANCE OF THE CONSTITUTION?

If the answer is "NO" than said "LAW OF THE UNITED STATES" cannot be regarded as the "LAW OF THE LAND" and cannot be enforced as law.

It could logically be concluded from the "Johnson" letter, that the claimants constitutionally guaranteed Due Process of Law rights (his right to a FAIR decision, consistent with the facts and applicable laws, were violated, supposedly under "color of law." Almost 200 years ago, Thomas Jefferson in anticipation of such situations described above said:

> ". . . IN QUESTIONS OF POWER THEN, LET NO MORE BE HEARD OF CONFIDENCE IN MAN, BUT BIND HIM DOWN FROM MISCHIEF BY THE CHAINS OF THE CONSTITUTION."

Concern over situations such as those referred to above, also resulted in my writing a letter dated February 10, 1981 to Mr. S.G. Petterson, the then acting V.A. Adjudication Officer in the Portland, Oregon, V.A.

Regional Office. In that letter, it was my intent to determine if V.A. quasi-judicial officers felt "ANY" responsibility at all to the Constitution of the United States. I therefore semply asked:

> "ARE JUDICIAL OFFICERS OF THE V.A. REQUIRED TO TAKE AN OATH TO UPHOLD, SUPPORT AND DEFEND THE CONSTITUTION OF THE UNITED STATES?

Mr. Pettersons letter in response, dated February 2, 1981, the question was answered with one word -- NO! In a February 10, 1981 letter to Mr. Petterson, I pointed out the mandate of the Constitution concerning said situations, and asked that he explain on what basis the V.A. had been exempted from the mandate of the Constitution. Mr. Pettersons response to that letter appear in part as follows:

> "YOU ARE ABSOLUTELY CORRECT. . . I HAVE ATTACHED A COPY OF THIS FORM FOR YOUR INFORMATION. I APOLOGIZE FOR THE OVERSIGHT ON OUR PART. . ."

The POINT of the above exchange of letters, in my opinion, is that an adjudication officer of the V.A. neither knew of, nor felt, any responsibility or obligation to the Constitution, or its Due Process of Law protections of the rights of the American people -- YET -- that man was tasked with the trust of participating in decision making processes concerning the lives of citizens who were injured defending the Constitution. I was shocked.

Concerning the STANDARD OF REVIEW/SCOPE OF REVIEW which a court should, in our opinion, exercise over V.A. decisions, Veterans Due Process defers to the judgement of those perceived by this organization to be expert in the technicalities of the law in this specific area. The National Veterans Law Center and the judgement of David F. Addlestone, Ronald Simon and Lewis Milford, concerning the scope of review, are the best expressions of this issue of which we are aware, and we are in agreement with them.

In reviewing that organizations recent statement before the Senate Veterans Affairs Committee, the two possible alternatives are as follows:

1. ARBITRARY AND CAPRICIOUS TEST: REVIEW OF QUESTIONS OF LAW.
2. SUBSTANTIAL EVIDENCE TEST: PROVIDES FOR REVIEW OF FACT.

Veterans Due Process supports the "SUBSTANTIAL EVIDENCE TEST" based upon the reasons outlined on the statement to the Senate Veterans Committee, and also because our research of the issue leads us to believe that the substantial evidence test would do more to ensure the FUNDAMENTAL FAIRNESS which we seek, both in V.A. decisions and court review.

VDP has also taken notice of the statement of Fred Davis, as it appears in the minutes of the October 26, 1978 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES meeting, page 3, paragraph 5, wherein he stated:

> ". . .THE ARBITRARY AND CAPRICIOUS TEST IS NOT VERY MEANINGFUL. . ."

VDP does believe that in a case wherein a veteran presents his claim ALONE, wherein he does not assert all the evidence which he has, and thus presents an ill grounded case; that a review "de novo" would be almost necessary in assuring that the veteran would have a full and complete airing of his claim. It is our opinion that a federal district court, in such a situation, could not properly review the case and come to a just result based on the "substantial evidence test."

VDP is aware that there is some interest in the creation of a special veterans court, which would review cases appealed from the B.V.A. We are opposed to that concept for numerous reasons, including those listed by David F. Addlestone at the National Veterans Law Center.

Concerning the $10.00 limitation on attorneys fees, VDP urges Congress to eliminate that antiquated law (passed in 1862). Veterans should have the right to hire an attorney to represent them through the V.A.'s complex legal system, if they choose to do so. We can appreciate the concern expressed by some other veterans organizations concerning "over reaching or unscrupulous" attorneys, but the overriding consideration should be to maximize the possibility for a veteran to secure Due Process of Law protections. Under present law, the veterans only avenue for procuring legal representation is through one of the veterans service organizations, thus REQUIRING that person to approach a private organization in order to try to obtain benefits to which he is entitled by law. Battle-injured veterans have certainly earned the right to hire professional counsel, and should not be denied denied that freedom.

It is the opinion of VDP that the attorney fee limitation as it exists in existing judicial review bills, is still unrealistically low in todays world, and in our opinion, could continue to deny the veteran the freedom to seek professional legal help--the right to counsel.

I come from the corporate world, and was educated in business analytical skills in college, through the Dun & Bradstreet educational system, and on the job as an employee of a major national corporation, at the corporate headquarters level. One of my functions while employed in that capacity, was as a member of a corporate troubleshooting team which was dispatched to divisions and subsidiaries of the corporation when they were failing to meet corporate projections (budget, etc.). Our first job in such situations was to define the problems by conducting a thorough analysis. Almost without exception, the problems were people, and we would implement corrective mechanisms in order to bring those corporate members back into the standards of the corporate family. It is only the close SCRUTINY which exists within the corporate framework, which enabled the corporate headquarters to detect problems, and correct them.

My corporate background causes me to shudder whenever I think about the lack of accountability/freedom from scrutiny, which the V.A. presently enjoys in its consumption of taxpayers dollars. I have listened to members of Congress complain: "WE CANNOT EVEN LOOK INTO THE V.A. IN ORDER TO ENSURE THAT IT IS FOLLOWING THE MANDATE OF THE United States Congress."

The V.A. had a quote from Abraham Lincoln on the bottom of its letterhead which appeared as follows:

> "TO CARE FOR HE WHO HATH BORNE THE BATTLE, AND FOR HIS WIDOW, AND HIS ORPHAN."

It is our opinion that the V.A. now considers its primary function as being:

> "TO CARE FOR HE, WHO CARES FOR HE WHO HATH BORNE THE BATTLE..."

In other words, it is the opinion of many people, that the V.A.'s primary concern now, is to perpetuate itself, which is a rather easy transition to make, for an agency which enjoys freedom from outside scrutiny.

Chairman Montgomery and the members of this Subcommittee, on the basis of this and the other testimony which you have heard during these hearings on Judicial Review, I urge you to support the passage of a meaningful form of Judicial Review for America's veterans.

The Senate has voted unanimously once again on the judicial review legislation, as it has session after session of Congress, in order to try to make Due Process of Law a reality for America's veterans. It is our belief that a meaningful form of judicial review for veterans is in your hands, and we ask that you please allow the entire House of Representatives to vote the will of their constituents on this important matter.

Mr. Chairman, this concludes my statement, and I will be glad to answer any questions that I can.

THANK YOU.

Veterans Due Process INC.
P.O. BOX 68237 PORTLAND, OREGON 97268-0237
(503) 659-9912

COMPARATIVE LEGAL RIGHTS

GROUP	RIGHT TO APPEAL TO A FAIR AND IMPARTIAL COURT OF LAW	RIGHT TO HIRE AN ATTORNEY
CLAIMANTS WITH OTHER AGENCIES OF THE FEDERAL GOVERNMENT, SUCH AS SOCIAL SECURITY.	YES	YES
WORKMAN'S COMPENSATION CASES.	YES	YES
WELFARE CASES.	YES	YES
ILLEGAL ALIENS.	YES	YES
MURDERERS, RAPISTS, THIEVES.	YES	YES
TRAITORS, SPIES, ASSASSINS, TERRORISTS, ETC.	YES	YES
VETERANS, INJURED DEFENDING THE CONSTITUTION AND THE RIGHTS AND FREEDOMS WHICH IT GUARANTEES FOR ALL AMERICANS, INCLUDING THE GROUPS LISTED ABOVE.	**NO** (Title 38 United States Code, Section 211a) (Veterans Admin. Law)	**NO** (Title 38 United States Code, Section 3404c)

The Veterans Administration (V.A.) sits in final judgment of its own decisions. It is also EXEMPTED from having to comply with the ADMINISTRATIVE PROCEDURES ACT OF 1946 (Title 5 U.S. Code), which was passed to protect the rights of the American people from violation by our government.

The above cited statues "have even been held to preclude judicial relief from decisions of the Administrator (V.A.), where such decision is wholly unsupported by evidence, wholly dependent upon a question of law, or clearly arbitrary or capricious." (Ref: American Law of Veterans, 1954 Edition, The Lawyers Co-Operative Publishing Company, Page 53).

IT'S TIME FOR A CHANGE, AND WE NEED YOUR HELP.

PLEASE CONTACT: Veterans Due Process, Inc.
P. O. Box 68237
Portland, Oregon 97268
(503) 659-9912

Please also write your congressmen and the President and tell them to vote in favor of current legislation which would protect members of your families from being victimized by these bad laws.

A TRAGIC CASE IN POINT

. . . The crippled veteran returns home to an uncertain life ahead and to the certainty of a callous and squalid VA Hospital system. Private Leroy Baily was sleeping in Vietnam when a Cong rocket tore through his tent and exploded in his face. He lived. After three years in a Chicago VA Hospital, he was discharged — without a face. He had one overwhelming desire — to chew solid food again. A private surgeon began a series of operations to reconstruct Leroy's face. The first bill sent to the VA prompted this reply,

> ". . . IT IS REGRETTED THAT PAYMENTS ON THE ABOVE CANNOT BE APPROVED, SINCE THE TREATMENT WAS FOR A CONDITION OTHER THAN THAT OF YOUR SERVICE-ORIENTED DISABILITY. . . ."

The VA inflexibly maintained this decision and only a Presidential intercession finally forced them to provide the benefits Leroy Baily merited.

REF: YOU CAN FIGHT CITY HALL AND WIN, by Thomas A. Pezzuti
ISBN 0-8202-0168-5 (Page 69)

RESOLUTION

VIETNAM VETERANS ORGANIZATIONS UNITED

November 10, 1982

WHEREAS, veterans with claims against the Federal government, through the Veterans' Administration are precluded from any Judicial Review as to questions of fact or law from adverse decisions by the Veterans' Administration; and

WHEREAS, veterans with claims against the Federal government, through the Veterans' Administration are effectively denied the right to an attorney due to a $10.00 limitation on attorneys' fees; and

WHEREAS, this denies veterans due process of law, guaranteed to every American by the Constitution, and thus relegates a veteran to a second class citizenship status; and

WHEREAS, there is presently pending in Congress legislation that will provide for Judicial Review for decisions adverse to such veterans.

NOW, THEREFORE, BE IT RESOLVED, That the Vietnam Veterans Organizations United, by their delegates assembled in the United States Capitol Building, Washington, D.C., on November 10, 1982, do hereby call upon the Chairman and members of the House Committee on Veterans Affairs to report, and for the full membership of the House of Representatives to approve, legislation passed by the United States Senate (S.349, The Veterans Administration's Administrative Procedure and Judicial Review Act) providing for Judicial Review of Veterans Administration decisions adverse to the American veteran. In addition, the Vietnam Veterans Organizations United hereby urges the President of the United States to reverse his opposition to this legislation and vigorously support its adoption.

Dan Jordan

Dan Jordan
Nat'l. Commander
United Vietnam Veterans Org.

John P. Terzano
VVA

John Terzano
Vietnam Veteran of American

Philip E. Cushman
Veterans Due Process, Inc.

Jeff Stanton
Center for Veterans Rights

Patrick M. Reilly

Patrick M Reilly
Brotherhood of Vietnam Veterans

Air Force Sergeants Association

STATEMENT OF FRANK E. G. WEIL

FOR THE AMERICAN VETERANS COMMITTEE (AVC)
BEFORE
THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE
HOUSE VETERAN AFFAIRS COMMITTEE
ON
JUDICIAL REVIEW OF VA DECISIONS AND
LIMITATIONS OF ATTORNEYS' FEES

JULY 26, 1983

Mr. Chairman and Members of the Committee:

The AMERICAN VETERANS COMMITTEE appreciates this opportunity to appear before you and address the important issues of Judicial Review of VA Decisions and Limitations of Attorneys' Fees and the related legislation now pending before this committee. My name is Frank E. G. Weil; I am National Secretary of the American Veterans Committee and the Chairman of its Commission on Veterans Affairs and the Armed Services. I served in the United States Army during World War II as a Special Agent, Counter-Intelligence Corps, and am a member of the bar of the District of Columbia and the State of New York.

The AVC supports the principle of judicial review of veterans claims, as well as that of lifting the restrictions on attorneys' fees, so as to enable those veterans who wish to, to avail themselves of the services of members of the bar. I have had the privilege of testifying before the Senate Committee on Veterans Affairs on October 10, 1977 and on March 22, 1979 on the same subject, and I wish to incorporate by reference my testimony on those two dates.

The AVC has long been on record in favor of providing judicial review of VA decisions and of raising the limitations on attorneys' fees. Our current policy resolution on these crucial issues reads as follows:

> AVC supports the principle of review by the federal courts of the decisions of the Board of Veterans Appeals and abolition of the present $10 limit for attorneys' fees which now inhibits representation of veterans by attorney.
>
> To that end, AVC supports S. 636 and similar legislation.

AVC does have some suggestions applicable to S.636 and H.R. 2936 (references to S.636 are to the version dated May 18, 1983, as reported by Senator Simpson with amendments):

1. AVC prefers the provisions of H.R. 2936 to those of §105 of S. 636. The House proposals are clearer and less cumbersome. If however, § 105 is to prevail, AVC wishes to point out that § 105(2)C) is not clear; this provides that, in case of a disagreement between members of the section of the Board of Veterans Appeals (BVA), the additional members appointed under 4001(c)(1) or (2) are not to vote. If, in all cases in which there is disagreement within the BVA section, the Chairman of the BVA comes into the picture and casts the deciding vote, then there is no need for the restriction on voting by the "extra" members. If this is not the case, the restriction makes no sense.

2. AVC disagrees with the wording of proposed 4009(c) which bars judicial review in case of medical disagreements. These matters should be open to judicial review on the same basis as other matters.

3. AVC agrees with the language of Section 201, except for the italicized words (presumably inserted as a part of Senator Simpson's amendment(s)). § 201 brings VA regulations under the Administrative Procedures Act (A)A); the VA would join the bulk of the government in being subject to the APA. The rest of the government manages to deal with matters pertaining to agency management, personnel, public property and contracts, despite being subject to the APA, and the VA should deal with those matters in the same manner; being partly subject and partly not subject to the APA makes for needless complications.

4. AVC endorses the proposals contained in Title III of the bill, on judicial review. AVC suggests, however, that instead of limiting the forum to the United States District Courts, access be also provided to the United States Claims Court (the newly created successor to the Court of Claims), with appeals going to the United States Circuit Court for the Federal Circuit. These courts are already familiar with much of the subject-matter likely to be covered by veterans claims, and may be more ready to handle VA benefit matters.

5. AVC endorses Title IV on attorneys' fees in principle, but with the following observations:

a. The continuation of the previous $10 limit through the final decision of the Administrator is likely to prove counterproductive. It is often easier for counsel to guide an applicant early rather than having to overcome the mistakes made at an earlier stage by an applicant _pro se_. It is also likelier to result in applications for judicial review. AVC suggests that this limitation be substantially raised, or abolished.

b. Basing the ceiling on attorneys' fees on percentages of past-due benefits may give attorneys an incentive to delay final resolution of cases, so that the amount of past-due benefits is sufficiently large to yield a higher fee. AVC recommends dropping the "past due" and substituting a provision that the attorneys'fee may not consume more than a stated percentage of benefits coming due subsequent to the resolution of the matter. This would prevent attorneys' fees from swallowing a large percentage of current benefits, while making current benefits available as a source of fees. Where there were already benefits payable, but the claim as to which the fee is payable results in an increase, the fee should be limited to some portion of the increase, until the total fee is paid.

REBECCA (BECKY) DeBOER
JACKSON COUNTY
DISTRICT 50

REPLY TO ADDRESS INDICATED:
☐ House of Representatives
Salem, Oregon 97310
☐ P.O. Box 4248
Medford, Oregon 97501

HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310

COMMITTEES
Vice-Chair:
Business & Consumer Affairs Committee
Member:
Human Resources Committee
Labor Committee
Caucus Policy Committee
State Chairperson:
American Legislative Exchange Council

STATEMENT OF OREGON STATE REPRESENTATIVE
REBECCA (BECKY) DE BOER, DISTRICT 50
JACKSON, COUNTY, OREGON

BEFORE THE
HOUSE VETERANS AFFAIRS SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS.
JULY 21, AND 26, 1983

SUBMITTED BY:

Rebecca DeBoer
REBECCA (BECKY) DE BOER

PRESENTED BY:
JEFFREY R. STANTON

TESTIMONY OF REBECCA (BECKY) DE BOER
OREGON STATE REPRESENTATIVE DISTRICT
50, JACKSON COUNTY

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE

I WISH TO THANK YOU FOR THE TIME AND OPPORTUNITY TO PRESENT TESTIMONY ON THE ISSUE OF JUDICIAL REVIEW AND ATTORNEY FEES.

THE LEGISLATION BEFORE YOU TODAY HAS BEEN A STRONG CONCERN OF MINE AND I FIND IT INCONCEIVABLE THAT OUR NATIONS DEFENDERS HAVE BEEN DENIED THEIR DUE PROCESS PROTECTION. THIS INJUSTICE HAS CONTINUED FOR TO MANY YEARS.

MY STAFF HAS INVESTIGATED THE ISSUE ON JUDICIAL REVIEW AND THE $10.00 LIMIT ON ATTORNEY FEES. OF INTEREST TO ME IS THE VETERANS ADMINISTRATIONS ANNUAL REPORTS OF 1977, 1978, AND 1979 WHICH STATES "THE MODERN TREND OF THE COURTS IS TO ASSUME JURISDICTION IN OTHER TRADITIONALLY NONREVIEWABLE AREAS. THIS TREND AND THE CONTINUING CONCERN IN THE VETERANS ADMINISTRATION TO INSURE THAT VETERANS AND DEPENDENTS RECEIVE ALL THE DUE PROCESS PROTECTION AVAILABLE TO OTHER AMERICANS COMPELLED THE VA TO REEVALUATE THE POSITION OF THE AGENCY WITH RESPECT TO JUDICIAL REVIEW. THE AGENCY NO LONGER OBJECTS TO MODIFICATION OF THE LONGSTANDING STATUTORY PROHIBITION OF JUDICIAL REVIEW." WITH THE FACT THAT 68,229 VETERANS HAD NO REPRESENTATION OR PRESENTED THEMSELVES ON CLAIMS BEFORE THE BOARD OF VETERANS APPEALS FROM 1972 THROUGH 1979, CONVINCES ME OF A NUMBER OF BENEFITS FOR JUDICIAL REVIEW AND REVISION OF THE ATTORNEY FEE LIMITATION.

1. THE 68,229 VETERANS WOULD HAVE HAD THE OPTION TO HIRE AN ATTORNEY FOR A REASONABLE FEE TO REPRESENT THEM, TO OBTAIN A MEASURE OF JUSTICE.

2. THE VETERAN OR DEPENDENTS WITH BENEFITS CLAIMS PENDING FOR ONE, FIVE OR TEN YEARS, MAY NOT HAVE DROPPED THEIR CLAIMS IF THEY HAD THE AVAILABILITY OF AN ATTORNEY TO REPRESENT THEM.

3. IT IS ONLY JUST TO ALLOW THE VETERAN THE OPTION OF AN ATTORNEY FOR A REASONABLE FEE, WHEN THE BOARD OF VETERANS APPEALS HAS A STAFF OF OVER 140 ATTORNEYS.

AS A RESULT OF THESE FACTS, THE SIXTY-SECOND LEGISLATIVE ASSEMBLY OF THE STATE OF OREGON ADOPTED WITH UNANIMITY, SENATE JOINT MEMORIAL 1 WHICH ASKS CONGRESS OF THE UNITED STATE TO PROMPTLY APPROVE AND ENACT THE VETERANS ADMINISTRATION ADJUDICATION PROCEDURES AND JUDICIAL REVIEW ACT. (COPY ATTACHED)

ADDITIONAL SUPPORT FOR THIS LEGISLATION INCLUDES GOVERNORS LETTERS, STATE MEMORIALS, RESOLUTIONS AND PROCLAMATIONS FROM THE STATES OF OREGON, OKLAHOMA, WYOMING, PENNSYLVANIA, COLORADO, FLORIDA AND CONNECTICUT WHICH REPRESENTS 4,645,426 VETERANS.

THANK YOU FOR THE TIME TO EXPRESS MY THOUGHTS ON THIS IMPORTANT ISSUE AND I HOPE THAT PROMPT ACTION WILL BE TAKEN TO APPROVE THIS LEGISLATION.

62nd OREGON LEGISLATIVE ASSEMBLY--1983 Regular Session

Enrolled

Senate Joint Memorial 1

Sponsored by Senator McFARLAND, Representative COURTNEY, Senators BROWN, DAY, Representatives DeBOER, FARMER, FORD, MASON, B. ROBERTS, L. ROBERTS, SPRINGER, YOUNG, ZAJONC, Senators FRYE, GARDNER, HAMBY, HEARD, ISHAM, McCOY, MONROE, POTTS, RIPPER, ROBERTS, RYLES, THORNE, TIMMS, WYERS, Representatives BROGOITTI, JOHNSON (at the request of Jeffrey Stanton, Philip Cushman, Veterans Due Process)

To the Senate and House of Representatives of the United States of America, in Congress assembled:

We, your memorialists, the Sixty-second Legislative Assembly of the State of Oregon, in legislative session assembled, respectfully represent as follows:

Whereas under current federal law a veteran making a claim for benefits from the Veterans' Administration, or appealing an adverse decision concerning a claim, may not pay an attorney more than $10 for legal services and representation; and

Whereas this century-old fee limitation severely limits the ability of a veteran to obtain effective legal counsel; and

Whereas current federal law further provides that decisions of the Veterans' Administration on any question of law or fact concerning claims for benefits for veterans, their dependents or survivors are final and conclusive and not subject to review by any other official or court of the United States; and

Whereas the Veterans' Administration is unique among major federal agencies in that its benefit decisions are not subject to the scrutiny of the federal courts; and

Whereas this lack of effective legal representation and absence of judicial review constitute a denial of due process of law to veterans; and

Whereas this denial of due process often results in hardship and disillusionment for those who have defended our country; now, therefore,

Be It Resolved by the Legislative Assembly of the State of Oregon:

(1) The Congress of the United States is memorialized to promptly approve and enact S. 349, the Veterans' Administration Adjudication Procedure and Judicial Review Act, or similar legislation, in order to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs and for payment of reasonable attorney fees for rendering legal representation to veterans claiming benefits under laws administered by the Veterans' Administration.

(2) A copy of this memorial shall be sent to the President of the United States, the President pro tempore of the Senate, the Speaker of the House, the Chairs of the Veterans Affairs Committees of the House and Senate and to each member of the Oregon Congressional Delegation.

Adopted by Senate March 14, 1983

Secretary of Senate

Edward N Fadeley

President of Senate

Adopted by House April 29, 1983

Grattan Kerans

Speaker of House

SHIRLEY GOLD
MULTNOMAH COUNTY
DISTRICT 14

REPLY TO ADDRESS INDICATED:
☐ House of Representatives
Salem, Oregon 97310

☐ 4626 SE. 36th Avenue
Portland, Oregon 97202

COMMITTEES
Chairperson:
House Committee on Human Resources
House Sub-Committee on Aging and Minority Affairs
Member:
House Committee on Labor

HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310

STATEMENT OF OREGON STATE REPRESENTATIVE
SHIRLEY GOLD, DISTRICT 14 MULTNOMAH

BEFORE THE
HOUSE VETERANS' AFFAIRS SUB-COMMITTEE
ON OVERSIGHT AND INVESTIGATIONS.

JULY 21, and 26, 1983

SUBMITTED BY:
Shirley Gold
SHIRLEY GOLD

PRESENTED BY:
Elizabeth Raw Bordt
ELIZABETH RAWLINS-BORDEAUX

TESTIMONY OF SHIRLEY GOLD
OREGON STATE REPRESENTATIVE DISTRICT 14
MULTNOMAH COUNTY

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE

I WISH TO THANK YOU FOR THE TIME AND THE OPPORTUNITY TO PRESENT TESTIMONY ON THE ISSUE OF JUDICIAL REVIEW AND ATTORNEY FEES.

WE HAVE HEARD OVER THE YEARS, MONTHS, AND WEEKS, MUCH TESTIMONY SUPPORTING THE PRESENT FORM OF REVIEW FOR VETERAN CLAIMANTS. HOWEVER, THE SUPPORTING TESTIMONY ONLY EMPHASIZES WHAT SHOULD BE - WHAT IS SUPPOSED TO BE - TAKING PLACE. NOT WHAT IS.

THE VA DOES NOT NOW ENJOY A COOPERATIVE RELATIONSHIP WITH A VETERAN OR DEPENDENT CLAIMANT IN AN EFFORT TO FULLY DEVELOP SAID CLAIM PRIOR TO ADJUDICATION. THE VA APPROVES CLAIMS THAT ARE SUPPORTED ONLY BY EVIDENCE PROVING BEYOND ANY DOUBT THE CASE BEFORE IT. THE RULES OF EVIDENCE EMPLOYED BY OUR FEDERAL JUDICIARY SYSTEM ARE, LIKEWISE, THE DECIDING FACTOR IN THE SUCCESSFUL OR UNSUCCESSFUL OUTCOME OF A VA CLAIM.

WE HAVE HEARD AGE-OLD TESTIMONY WHICH PRESUPPOSES THAT IF JUDICIAL REVIEW FOR VETERANS BECOMES THE LAW OF THE LAND - VETERANS WILL BE AUTOMATIC AND IMMEDIATE PREY FOR UNSCRUPULOUS, SELF-SERVING OR INADEQUATELY TRAINED ATTORNEYS. THIS PARTICULAR MIND SET IS NOT ONLY A SLAP ACROSS THE PROVERBIAL FACE OF OUR AMERICAN BAR ASSOCIATION AND ALL ATTORNEYS, BUT IT IS FURTHER DISCRIMINATION AGAINST ALL VETERANS - PAST, PRESENT, AND FUTURE - TO ENJOY ACCESS TO THE COURTS OF THIS LAND WHICH ARE ACCESSIBLE TO THE MOST HEINOUS OF SOCIETAL OFFENDERS.

I FEAR THAT WHAT THIS ENTIRE ISSUE BOILS DOWN TO IS THAT THOSE WHO ENJOY THINGS THE WAY THEY NOW ARE, MAY FEEL THREATENED AND PERHAPS SHOULD. THE PRESENT SYSTEM IS NOT WORKING. IT IS OUR RESPONSIBILITY TO MODIFY IT SO THAT IT DOES - AT WHATEVER SHORT-TERM COST, AS THIS COST WILL CERTAINLY BE WORTH THE LONG-TERM SECURITY WE WILL ALL ENJOY.

LET'S NOT USE THE FEEBLE AND SUPERFICIAL PLATFORM THAT JUDICIAL REVIEW WILL RESULT IN EXHORBITANT ATTORNEY FEES; THAT JUDICIAL REVIEW WILL ROB THE VETERAN AND/OR DEPENDENTS OF THE BENEFITS GAINED IN LITIGATION; OR THAT JUDICIAL REVIEW WILL EXTRACT EVEN MORE DOLLARS FROM THE POCKETS OF TAXPAYERS. JUDICIAL REVIEW WILL ENSURE THAT THE VA AND THOSE SKILLED ADVOCATES FROM VETERAN'S SERVICE ORGANIZATIONS DO WHAT THEIR BY-LAWS, THEIR CHARTERS, THEIR MEMBERS, PROMISE AND DIRECT, THUS ELIMINATING ANY OVERLOAD FROM MASSIVE VETERANS CLAIMS IN THIS COUNTRY'S COURTROOMS. LET'S NOT FORGET - VETERANS ARE ALSO TAXPAYERS. WITHOUT VETERANS WOULD ANY OF US ENJOY ACCESS TO THIS NATION'S COURTS? WOULD WE ENJOY THE FREEDOM TO ASSEMBLE? WOULD WE ENJOY ANY OF THE FREEDOMS WE NOW ENJOY?

THE MEN AND WOMEN WHO SERVED THIS COUNTRY (YOU AND ME) WENT BECAUSE WE TOLD THEM TO. SOME OF THEM DID NOT WANT TO GO - MANY DID. NO MATTER, THEY STILL WENT. THOSE WHO RETURNED NEEDING HELP, WERE CONFIDENT THAT THEY WOULD FIND IT, AND THEY HAVE NOT. IF THEY HAD, WE WOULDN'T BE SPENDING THOUSANDS OF DOLLARS ON HEARINGS, HERE AND NOW, IN AN EFFORT TO SECURE THIS HELP. IT SADDENS ME TO SEE VETERANS LEFT WITH NO ALTERNATIVE BUT TO THANK THEMSELVES FOR A JOB WE TOLD THEM TO DO. THAT IS OUR RESPONSIBILITY - NOT THEIRS.

WHAT VETERANS GIVE US IS TIME. THEY GIVE US TIME TO LIVE OUR LIVES THE WAY WE WANT TO, AND THEY PROTECT THIS TIME WHENEVER THEY ARE SENT INTO BATTLE. VIETNAM

VETERANS AND THEIR FAMILIES WILL ONE DAY BE CALLED UPON TO TAKE THEIR PLACES IN THE LEGISLATURE, IN THE CORPORATE BUSINESS WORLD, IN THIS NATION'S TOP DECISION-MAKING - AS WILL THOSE WHO FOLLOW THEM. HOWEVER, IT IS UP TO THE PEOPLE NOW IN THESE POSITIONS OF POWER, POSITIONS MADE POSSIBLE BY NONE OTHER THAN OUR PAST VETERANS, TO ENSURE THAT EACH POSITION OF POWER IS HELD BY A COMPETENT, CAPABLE INDIVIDUAL WITH THE FORESIGHT TO TRULY CARRY ON THE WISHES OF OUR FOUNDING FATHERS.

TO OVERLOOK THE SAFEGUARDS OF ENSURING STRENGTH AND COMPETENCE IN THIS COUNTRY'S FUTURE LEADERS, IS TO SENTENCE EACH AND EVERY ONE OF OUR VERY OWN FAMILY MEMBERS TO INCONCEIVABLE HARDSHIP. WE WILL IN ALL ACTUALITY, BE LABELLING VETERANS AS A LIABILITY - A POOR RISK - AS A WIFE OR A HUSBAND, AS A FATHER OR A MOTHER, AS A PROVIDER, WHEN THAT LABEL OUGHT ACTUALLY BE PLACED ON US. IF WE CANNOT SUPPORT OUR VETERANS THROUGH MEDICAL AND PSYCHOLOGICAL SERVICE CARE - FIRST RATE SERVICE CARE - THEN WE ARE THE POOR RISK.

THANK YOU FOR THE TIME TO EXPRESS MY THOUGHTS ON THIS MOST CRITICAL OF ISSUES, AND I SINCERELY HOPE THAT PROMPT ACTION WILL BE TAKEN TO APPROVE THIS LEGISLATION.

LONNIE ROBERTS
MULTNOMAH COUNTY
DISTRICT 21

REPLY TO ADDRESS INDICATED:
☐ House of Representatives
Salem, Oregon 97310
☐ 16915 SE. Mill Street
Portland, Oregon 97233

COMMITTEES
Member:
Agriculture and Natural Resources
Transportation

HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310

STATEMENT OF OREGON STATE REPRESENTATIVE
LONNIE J. ROBERTS, DISTRICT 21 MULTNOMAH

BEFORE THE
HOUSE VETERANS' AFFAIRS SUB-COMMITTEE
ON OVERSIGHT AND INVESTIGATIONS.

JULY 21, and 26, 1983

SUBMITTED BY:

LONNIE J ROBERTS
Lonnie Roberts
PRESENTED BY:
Jeff R. Stanton
JEFFREY R. STANTON

TESTIMONY OF LONNIE J. ROBERTS
OREGON STATE REPRESENTATIVE DISTRICT
21, MULTNOMAH COUNTY

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR THE OPPORTUNITY (VIA MR. STANTON) TO PRESENT MY VIEWS ON WHETHER THERE SHOULD BE JUDICIAL REVIEW OF VETERANS' ADMINISTRATION (VA) DECISIONS ON VETERANS' CLAIMS FOR BENEFITS AND SERVICES.

AS CHAIRMAN OF THE OREGON HOUSE COMMITTEE ON STATE AND FEDERAL AFFAIRS. I'VE HAD THE OPPORTUNITY TO HEAR TESTIMONY AND SPEAK DIRECTLY WITH MANY OREGON VETERANS, ON THE ISSUE OF JUDICIAL REVIEW. FROM MARCH 21ST TO APRIL 6TH, OREGON LEGISLATORS INVESTIGATED FOUR VA FACILITIES, AND FOUND THERE WAS A PROBLEM WITH BENEFIT CLAIMS AND APPEALS TAKING UP TO TEN YEARS, RESULTING IN HARDSHIP TO VETERANS AND THEIR FAMILIES.

AFTER THIS INVESTIGATION, I TRULY BELIEVE THE ONLY JUST SOLUTION TO THIS PROBLEM, IS PASSAGE OF LEGISLATION TO PROVIDE VETERANS ADMINISTRATION ADJUDICATION PROCEDURES AND JUDICIAL REVIEW.

JUDICIAL REVIEW

THE DEFINITION OF JUSTICE IS "THE PRINCIPLE OF RECTITUDE AND JUST DEALING OF MEN WITH EACH OTHER: AND THE CONFORMITY TO IT". WEBSTERS COLLEGIATE DICTIONARY:1941

EACH DAY IN THE OREGON LEGISLATIVE SESSION, WE STATE WITH, "I PLEDGE ALLEGIANCE TO THE FLAG OF THE UNITED STATES OF AMERICA" AND END WITH FOUR WORDS "AND JUSTICE FOR ALL" NOT AND JUSTICE FOR A FEW, BUT FOR ALL.

DUE PROCESS OF LAW IS GUARANTEED TO EVERY AMERICAN, AND OUR VETERANS' WHO HAVE FOUGHT TO PROTECT OUR CONSTITIONAL RIGHTS ARE CERTAINLY NO LESS DESERVING OF, AND IN FACT, HAVE EARNED THEIR DUE PROCESS PROTECTIONS.

THROUGHOUT THIS NATIONS HISTORY, COUNTLESS PATRIOTIC AMERICANS HAVE DEMONSTRATED GREAT COURAGE AND ENDURED HARDSHIP TO PRESERVE AND PROTECT ITS SECURITY. THE HUMAN COST ASSOCIATED WITH MAINTAINING THIS SECURITY HAS BEEN BORNE BY OUR VETERANS WHO BRAVELY ACCEPTED THE CALL OF THEIR COUNTRY DURING PERIODS OF NATIONAL CRISIS. IT IS INCONCEIVABLE TO ME, THAT MEN AND WOMEN OF THIS NATION, WHO SPILLED THEIR BLOOD FOR HER, COULD BE DENIED THEIR CONSTITITUTIONAL RIGHTS OF TRIAL BY JURY.

THE CENTURY-OLD FEE LIMITATION OF $10.00 SEVERELY LIMITS THE ABILITY OF A VETERAN TO OBTAIN EFFECTIVE LEGAL COUNSEL OF THEIR CHOICE AND THIS LACK OF CHOICE, CONSTITUTES A DENIAL OF DUE PROCESS OF LAW.

MEMBERS OF THE COMMITTEE, THE UNITED STATES SEPERATION FROM GREAT-BRITAIN IN 1776, WAS "FOR DEPRIVING US, IN MANY CASES, OF THE BENEFITS OF TRIAL BY JURY" WE, INFACT, HAVE BEEN DEPRIVING OUR NATION VETERANS OF THIS SAME BENEFIT. I ASK EACH OF YOU TODAY, TO CORRECT THIS INJUSTICE.

THANK YOU VERY MUCH FOR ALLOWING ME THE TIME TO EXPRESS MY THOUGHTS ON THIS IMPORTANT ISSUE.

★ STAR EXHIBIT No. 7

Board of Veterans Appeals Washington, D.C. 20420

Veterans Administration

DEC 3 1979

Mr. Arthur F. Cronin
Post Office Box 68
Gilbert, Pennsylvania 18331

Dear Mr. Cronin:

Your motion "to reverse the erroneous determination" made in your claim has been received.

It is noted that you are requesting administrative relief under the provisions of 38 U.S.C. 210(c)(2). Since this is a matter of administrative review and not subject to the jurisdiction of the Board of Veterans Appeals, I have referred your request to the Philadelphia Veterans Administration Center for appropriate action. The Administrator has the sole authority to determine entitlement to benefits under 38 U.S.C. 210. However, the question of equitable relief must first be referred to the regional office for further development or other action deemed appropriate.

I am pleased to direct your request to the proper authority and trust that you will be hearing from the Philadelphia Veterans Administration Center regarding this matter.

Sincerely yours,

Sydney J. Shuman

SYDNEY J. SHUMAN
Chairman

SPECIAL NOTE: Q.F.G
The enclosed statement from B.V.A. Chairman Schuman officially confirms that, while I have previously had 38 U.S.C. § 4004 Board adjudications which the "new and material evidence" proves are lawfully defective and, consequently, invalid, I have not in legal fact and truth ever been accorded the personal Section 210 Administrative hearing from the Administrator, nor ever received the official Section 211(A) adjudicational decision which that would entail. It is this personal administrative hearing in Washington, D.C. which I now justifiably seek.

Arthur F. Cronin
P. O. Box 68
Gilbert, Pa. 18331-0068

CERTIFIED MAIL NO. P284 485 313

July 13, 1983

Re: V.A. Compensation
Claim C9 950 043

Mr. John Ward, Service Officer
and/or Asst. Service Officer assigned to this Claim
The American Legion
Wissahickon Ave. & Manheim St.
P. O. Box 8079
Philadelphia, Pa. 19101

Gentlemen:

Pursuant to the regulatory provisions of 38 C.F.R. Sections 3.103(a) and more specifically 3.105(a), the V.A.'s Philadelphia Regional Office and/or its officially responsible federal employees, must, either non-adversarily acquiesce to and meet my lawfully justifiable and sustainable demands for immediate, appropriate, and equitable remedial redress in re the unlawful administrative rejection of my valid wartime compensation claims upon the U.S. Government; or else, effectively and expeditiously forward my latest and duly submitted official V.A. 1-9 Substantive Appeal for equitable administrative relief directly to V.A. Administrator Walters in accordance with the lawful statutory provisions and mandates of Section 210 of Title 38 U.S.C. (Jan. 1, 1959 Congressional Act P.L. 85-857) in relation to expeditiously receiving his personal administrative hearing in Washington D.C. and receiving his subsequent personal and official Section 211(a) adjudicational decisions and determinations in concern thereto.

Therefore, in certainly reasonable consideration of those essential facts, and in realization of the official Power of Attorney which I duly supplied your service organization with relative to obtaining such immediate and equitable relief and redress for me, and in serious consideration of the preponderance of "new and material evidence and relevant probative facts" which I have also presented you with in order to not only clearly and conclusively prove and validate my own combat veterans compensation claims, but also, of course, of the very distinct and unquestionably and favorable bearing which some of my very unique material evidence does also have on the compensation claims of all other similarly aggrieved U.S. veteran comrades.

I must reluctantly, but necessarily, advise herein, that, I personally find it questionably incredulous that the American Legion has allowed so much valuable time to elapse without even showing me the deserved courtesy of at least supplying me with a written and indicative commitment to such cause, nor to return answering phone calls in concern thereto.

If, in fact, the American Legion is officially refusing my written request for assistance in pressing my justified lawful demands for the due process and equal protections of the substantive laws which were previously and repeatedly denied to me by the V.A., then please, I respectfully and solicitously request, do have the corporate graciousness to clearly, succinctly, and expeditiously indicate in writing the specific reasons for such refusal, and I will immediately and appropriately institute other relative actions designed to finally and legally achieve the justice so long denied to me.

Respectfully yours,

Arthur F. Cronin

cc: Mr. Al Keller, Jr., Nat'l. Commander
of American Legion
Mr. Joel Keller, Dir. Monroe Cty. Dept. of Veterans Affairs

[illegible] Seal Exhibit No.

Form Approved
OMB No. 2900-0085

Veterans Administration

IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.

VETERANS ADMINISTRATION
APPEAL
TO ADMIN. H.N. WALTERS
~~[illegible]~~

1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print): CRONIN, ARTHUR F.
2. INSURANCE FILE NO., OR LOAN NO. (If pertinent):
3. CLAIM FILE NO (Include prefix): No. C9 950 043

4. IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN INDICATE RELATIONSHIP
☐ WIDOW ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER (Specify)

5. NAME OF CLAIMANT (If other than veteran):
6. ADDRESS OF CLAIMANT (Number & street, city, State & ZIP Code):
P. O. Box 68
Gilbert, Pa. 18331-0068

7. DATE OF DECISION BEING APPEALED: Administrative refusal to take action
8. VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State): Philadelphia Regional Office of U.S. Veterans Admin.

REPRESENTATION ➧ See Par. 6 of instructions on reverse side. Mr. Ward - American Legion

HEARING ➧ See Par. 7 of instructions on reverse side.
9A. DO YOU WISH TO BE PRESENT AT A HEARING? ☒ YES ☐ NO
9B. IF YES, SPECIFY PLACE ☐ FIELD OFFICE ☒ WASHINGTON, D.C.
NOTE: A personal hearing is not necessary nor is a decision made at the time of the hearing.

10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE Administrator H.N.W. ~~[illegible]~~ FOR RELIEF AS SET FORTH BELOW. *(State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.)*

The Philadelphia regional office has had "new and material evidence" and a V.A. 1-9 Appeal form which I submitted in October of 1982 that conclusively proves on official record that my wartime compensation claim upon the U.S. government was unlawfully rejected as a direct and detrimental result of the clear unmistakable and prejudicial errors which were committed by the government and/or its federal employees, in re my personal wartime combat services for this nation and the correct lawful date of my official order to that active Naval service. Yet they have refused to render an official decision on either to date, nor to take appropriate and equitable remedial action under the lawful provisions of Section 3.105(A) of 38 Code of Federal Regulations et al. Specifically stated, through error my personal combat services were denied and I was consequently deprived of the due process and equal protection of Section 354(A)&(B) et al of the January 1, 1959 Congressional Act P.L. 85-857, rights which are non-discriminatively accorded to all other veterans of my specific class. It is this Congressional Act under whose provisions this claim must be properly adjudicated, all retrospective laws and acts to the contrary, not legally withstanding nor prevailing (please see Section 9 and 12(B)&(D) of such Act P.L. 85-857). Respectfully noting that the longivity of this gross and continuing injustice dates back to the initial filing of a similar unanswered compensation claim in 1946. I hereby make a special plea for advancement of this 38 U.S.C. Section 210(B)&(C)(1)&(2) Appeal to the Administrator on any existing hearing docket, pursuant to the statutory provisions of Section 4007 of 38 U.S. Code. I close this Appeal by calling attention to the fact that I have never ever been previously provided with the official three-man personal hearing which is required by law in concern to the non-adversary processing of all such veterans claims upon the U.S. government. Because of established past experience, I respectfully request that I be provided with an expeditious personal acknowledgment from the Administrator confirming his receipt of this Section 210 Appeal.

(Attach additional sheets, if necessary)

11. DATE: June 6, 1983
12. SIGNATURE OF CLAIMANT (Or representative): Arthur F. Cronin

VA FORM 1-9
AUG 1981

SUPERSEDES VA FORM 1-9, JUN 1970, WHICH WILL NOT BE USED.

CERTIFIED MAIL No. P284 485 275

The American Legion
For God and Country

★ WASHINGTON OFFICE ★ 1608 "K" STREET, N.W. ★ WASHINGTON, D.C. 20006 ★
(202) 861-2700 ★

September 6, 1983

Honorable G. V. "Sonny" Montgomery, Chairman
Committee on Veterans Affairs
U.S. House of Representatives
335 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Montgomery:

This letter is in response to your communication of August 16, 1983 in which responses to questions arising out of the July 21, 1983 hearing on judicial review are sought. Let me apologize at the outset for failing to supply responses by August 30 as requested, but as you know attendance at our National Convention in Seattle made compliance with that deadline impossible.

Moreover, it should be clear that The American Legion opposes the concept of judicial review at the present time. The Legion has reasserted its opposition in resolutions adopted by National Convention delegates over the last several years including this year and Legion spokesmen have consistently made presentations at numerous Congressional hearings in accordance with these judicial review resolutions.

That notwithstanding, the National Executive Committee (NEC) of The American Legion has recently formed a Veterans Planning and Coordinating Committee to study issues of critical importance to veterans and is charged with making recommendations to the NEC after having considered these issues. This Committee has been divided into smaller subcommittees, one of which as you know is the Subcommittee on Judicial Review. The reason for establishing a separate judicial review subcommittee stems from serious differences of opinion within the organization on the merits of judicial review and because many Legion members feel that Legion arguments against judicial review have been adequately addressed in legislation, S. 636, passed by the Senate on June 15 of this year.

I offer this information so that, by way of background, you may fully understand the context in which responses to your July 21 hearing questions have been assembled. In that regard, the following responses bear the same assumptions implied in each of your eleven questions. Specifically, what problems will obtain if judicial review legislation in some form passes the Congress and is enacted into law? Since S. 636--bearing the title H.R. 2936--is the only judicial review legislation having passed either body,it is appropriate to make occasional reference to provisions of that measure.

1. Should there be concern over possible costs (attorneys fees, court costs, expert testimony, etc) to the veteran seeking judicial review of his claim, especially since he has no way of knowing whether he will prevail in the end?

The obvious short answer to this question is yes-there should be concern over possible costs to the veteran especially if he or she loses a bid in court. At issue though is a more important question of what constitutes an excessive or unfair cost to the veteran should he choose to press a case in court and lose. Similarly, assuming veterans would enjoy a right to judicial review if legislation were passed, what constitutes reasonable remuneration for the attorney representing the veteran in court?

The Senate passed legislation has sought to balance these concerns by establishing a maximum fee of either 25 percent of retroactive benefits if agreed upon by the veteran and his attorney or $500 in the case of a veteran who prevailed in court. Veterans losing in court would be obligated by a reviewing court to pay a maximum of $750. In no case could the attorney receive more than the currently specified $10 before the BVA rendered a final decision.

While there may be legitimate disagreement on what a fair cost to the veteran might be, there can be no mistake that the attorney representing a veteran deserves a fair reward for services rendered. Should veterans be allowed to press claims before the courts, veterans organizations claims representatives would be unable to assist the veteran without themselves being officers of the court. Someone would have to represent the veteran in court, and that someone would have to be an attorney.

If Congress deems judicial review appropriate, court costs and other costs associated with expert testimony should present little if any impediment. The amount of court costs is marginal ranging between $15 and $30. Expert testimony costs would be non-existent since judicial review would only permit federal review of the record. Only if trials of fact were at issue would expert testimony and their associated costs be brought into play.

2. Should the appellate court be allowed to hear the case de novo or should the review be limited to the record established during the administrative process?

Cases brought to federal court should not be heard de novo. More importantly, they would not be heard de novo if judicial review of BVA decisions were handled by the courts similarly to those of other categories of federal benefit appellants. Under these circumstances only the established record is reviewed by the court and even though that review might yield decisions of fact contrary to those rendered by BVA, no rehearing of the entire case is undertaken. Cases of this nature involving other federal beneficiaries are generally handled by the courts with great dispatch precisely because court review is limited to the established record of the case.

With this in mind, it should also be remembered that any factual judgments made by the courts contrary to BVA would have little if any adverse effect on a veteran's case. Since the veteran having won at the BVA would have no reason to use a federal court, factual judgments by a federal court contrary to those of the BVA would likely gravitate in favor of the veteran.

3. Would you be in favor of a proposal that would eliminate the Board of Veterans Appeals and allow judicial review of Regional Office decisions?

It has been stated in some quarters that should Congress act favorably on judicial review legislation, probably the BVA would be eliminated as unnecessary. This reasoning is generally supported by views that with court review veterans should be afforded a fast track opportunity to get cases into court directly from Regional Offices and that with court review the BVA can safely be eliminated as a cumbersome layer of adjudicative machinery.

On close examination each of these views lack merit sufficient to justify eliminating BVA and The American Legion is prepared to place the full strength of its resources in opposition to such a proposal regardless of Congressional deliberations on the issue of judicial review. Under current law, the BVA serves several important functions apart from the role it plays as the last adjudicative step in the VA claims process.

At least one of these functions, which would remain whether or not judicial review were adopted, serves to add uniformity to VA claims decisions made at the Regional Office level. In that regard, it is well known that some Regional Offices render decisions differently in similar cases than others and even when similar standards are employed by adjudicators, mistakes are often made as a result of the volume of cases handled. Frequently veterans organization claims representatives provide valuable assistance at the Regional Office level in correcting many of these errors. However, when a case reaches BVA, for example, which should have been awarded in favor of the veteran earlier, it is entirely appropriate for the case to be resolved at BVA without resort to federal courts even if that option were available in the event that BVA decided against the veteran.

Apart from the wisdom of retaining the BVA whether or not judicial review is adopted, those who would suggest otherwise seem convinced that BVA elimination would naturally follow if judicial review were enacted. This is particularly unfortunate since no such action is envisioned even by the Senate passed judicial review legislation. That measure, in fact, assumes the BVA to be so important that a provision within it would increase the size of the BVA from 50 to 65 members. Should the House move forward on some form of judicial review measure as the Senate has done, there seems no immediately clear good reason to accompany that movement with a simultaneous effort to eliminate BVA.

4. It is estimated that the median time from filing to disposition of cases in federal district courts is approximately 14 months. Should this time requirement be a consideration in determining whether or not judicial review is in the best interest of the veteran?

The subject of clogged courts with the attendant delays in judicial decisionmaking is an issue which looms large on the American political landscape and certainly deserves consideration in any discussion of veteran access to federal courts. For many veterans their dependents or widows, the time it takes under current law for BVA to render a decision on benefits is just as important as the final outcome. Were these cases to await decision over an even longer period of time would undoubtedly cause significant economic hardship for many.

For this additional reason, the BVA should be retained even if judicial review is permitted. Should BVA be eliminated and cases made eligible for federal court review which would otherwise have been decided at the BVA, the length of time it would take a court to render final judgement would likely be extended well beyond the estimated 14 month period it now takes the courts to dispose of cases.

On the other hand, if judicial review were adopted while retaining the BVA the resulting federal court case load expansion would be minimized. For those veterans who would go to court after having exhausted the VA adjudications process without satisfaction, the length of time a case pended in federal court--while inconvenient--would be less significant than the prospect of winning the case no matter how long it took.

5. Should there be concern with the cost to the taxpayer which may result from enactment of a judicial review statute?

Without knowing what taxpayer costs might be if judicial review were enacted, it is difficult to comment on the degree of concern which ought to accompany consideration of this issue. Those who favor judicial review, however, will not likely be disuaded from their position regardless of taxpayer costs. Arguably, the cost of justice in a democratic society ought to be subordinated to a relatively insignificant consideration in this matter. In that regard, it would probably be politically risky to oppose judicial review on grounds of taxpayer cost. For The American Legion to take the view that judicial review should be defeated by pointing to excessive costs would contradict our oft repeated view that veterans needs be accommodated whatever the cost.

6. Prior to enactment of judicial review, would it be worthwhile to conduct a study of the existing VA adjudication process in an effort to see how it might be improved?

As explained earlier in response to question three, Regional Office adjudications vary from place to place around the country. This is perhaps a natural outgrowth from the volume of cases adjudicated by virtually thousands of different individuals. The manuals, guides and circulars used by adjudicators do help in making decisions as uniform as possible. As long as different standards are inevitably applied in different Regional Offices, however, the BVA must be kept in place as the final VA arbiter.

Were the BVA to be eliminated in conjunction with adoption of judicial review, a study of VA adjudications procedures would become a must. On the other hand, if the BVA were retained along with adoption of judicial review, regular Congressional oversight of adjudications would probably be sufficient.

7. How do you respond to the claim that granting judicial review would create an unacceptable burden on the already overloaded federal court system?

As explained in question four, already overloaded federal courts could present veterans with serious problems of delay especially if Regional Office cases were eligible for court review in the absence of the BVA. For that reason, if judicial review is to be favorably considered by the House Veterans Affairs Committee, the Committee would be well advised to incorporate language in the legislation attempting to moderate the court delay problem. This might be done by allowing veterans in federal court the advantages provided under the Magistrates Act, 28 U.S.C. 636. In this way magistrates could alleviate the court overload burden by presiding over veteran cases in lieu of federal judges.

8. If judicial review by federal courts is allowed, at which level (District Court or Court of Appeals) should the review process begin?

During the hearing on July 21 there was a rather lengthy exchange of views on the subject of what level veterans ought to enter the federal courts. Surprisingly, there seemed little agreement among veterans organization witnesses who favored judicial review. If allowed to use the federal courts, uniformity with other federal benefit appellants would likely apply to veterans under the Administrative Procedures Act, 5 U.S.C 553. If that were the case veterans would bring their cases first before the federal District Court.

9. What role should attorneys play in the veteran's pursuit of his claim, i.e., at what stage of the process should the veteran be represented by an attorney?

If judicial review were passed by the House, it would be wise to incorporate language into the legislation similar in intent to that included in the Senate passed legislation where attorneys are concerned. The Senate provisions restrict lawyers fees to $10 at every stage in the VA adjudicative process until BVA renders a final decision. This would most likely deter lawyers from veteran cases until the veteran had exhausted the VA claims machinery and opted for review by a federal court.

The intent of this restriction makes good sense, since veterans organization claims representatives, through familiarity with VA procedures, are better equipped to prepare and present veterans claims in the VA than most lawyers. Also, this restriction would serve to continue the current practice of allowing veterans to have their cases presented for them throughout the VA adjudications process at no cost whatever even if judicial review is adopted.

10. How should an attorney representing a veteran be compensated for his work?

As discussed in questions one and nine, if lawyers are to bring cases before federal courts for veterans they ought to be entitled to fair payment for their services. Since the Legion does not favor judicial review at the present time, we have no suggestion to offer regarding what a fair fee might be. We do take the view, however, that lawyers should be prevented from exploiting veterans.

Should the Committee act favorably on judicial review legislation, it might well consider a more conservative fee formula than that adopted in the Senate legislation. For example, a House bill might simply bar a lawyer from any opportunity to reap a percentage of past due benefits if a claim for such benefits were won in federal court. The Senate measure would allow up to 25 percent for the lawyers if the veteran had agreed to that formula with the attorney prior to court review of the case.

11. Assuming the veteran is given the option of hiring an attorney, what effect will this have on the represententation currently provided by the veterans organizations?

Were judicial review adopted in a form which allowed attorneys to collect generous fees from veterans at every stage of the adjudications process up through and including federal court review, there would undoubtedly be some adverse effects on the representation currently provided veteran claimants by veterans organizations. It is unclear what the extent of this effect might be, but the most significant effects would be borne by the veteran who would have to pay for services provided at no cost at the present time. Once again, if judicial review is considered favorably by the committee, language similar to that in the Senate measure discouraging lawyers from VA claims until the BVA makes final decisions is advisable.

Mr. Chairman, hopefully this rather lengthy letter addresses your questions satisfactorily. As stated at the outset, the responses are offered in the constructive context of what problems might lie ahead for veterans if judicial review is adopted. Should these responses seem peculiar coming from an organization currently opposed to judicial review, please recognize that the scope of these responses has been limited by the questions asked.

Sincerely,

Paul S Egan

Paul S. Egan, Deputy Director
National Legislative Commission

AMERICAN VETERANS COMMITTEE

"CITIZENS FIRST, VETERANS SECOND"

NATIONAL OFFICE • 1346 CONNECTICUT AVENUE, N.W., SUITE 930, WASHINGTON, D.C. 20036 • 202-293-4890

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AUG 31 1983

August 24, 1983

Congressman G. V. Montgomery
Chairman
Committee on Veterans' Affairs
335 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Montgomery:

Thank you for your letter of August 16, 1983, asking several questions as a follow-up to your oversight hearings of July 21 and 26, 1983, on the question of judicial review of veterans' claims.

You will find enclosed a restatement of the questions for ease of reference, together with my answers to the questions. You will, of course, understand that I am responding without having had time to conduct a poll of my organization on each of these questions. I believe that I am generally in tune with the views of my organization, and that the answers generally represent their thinking, but if you decide to quote any part of the questions and answers, please attribute them to me as National Secretary or as Chairman of the Veterans and Armed Forces Affairs Commission of the American Veterans Committee, and not to the organization as such.

Thank you for the opportunity to respond.

Sincerely,

Frank E. G. Weil

Frank E. G. Weil
National Secretary

To achieve a more democratic and prosperous America and a more stable World

AMERICAN VETERANS COMMITTEE

"CITIZENS FIRST, VETERANS SECOND"

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1. Q Should there be concern over possible costs to the veteran seeking judicial review...?

A There should not; only the veteran whose claim has been finally denied by the Board of Veterans Appeals (BVA) will be considering going to court, and that veteran has already been denied. Furthermore, the proposal to abolish the $10 limit on attorneys' fees is couched in terms of a proportion of the past-due benefits obtained. This seems to indicate that if the veteran fails to prevail in court, he will not be charged.

2. Q Should the appellate court be allowed to hear the case de novo or should the review be limited to the record established during the administrative process?

A The form of the question already suggests the answer. An appeal, by definition, is something other than a de novo hearing. Ideally the court conducting the proceedings (in the Senate bill, this is the U. S. District Court) should have the power to conduct a de novo hearing (or to appoint a master or magistrate to conduct a de novo hearing), but that power should be used very sparingly, and only in cases where there is an allegation that there are defects in the manner the administrative record was established; even when there are such allegations, the use of the de novo hearing power should be limited to hearing the evidence which, it is alleged, was improperly excluded, and not to hear repetition of the matters already in the administrative record.

3. Q Would you be in favor of a proposal that would eliminate the BVA and allow judicial review of Regional Office decisions?

A No. This is bringing the judiciary too far into the agency machinery and will impose both too great a burden on the courts and too great an expense on veterans who would prevail under the present set-up.

4. Q It is estimated that the median time from filing to disposition of cases in federal district courts is about 14 months....

A In part of my testimony, I suggested that VA cases be made reviewable by the United States Claims Court, with appeal to the United States Court of Appeals for the Federal Circuit. The United States Claims Court (the successor to the trial stage of the former Court of Claims) holds hearings throughout the country by means of trial judges who ride circuit. BVA cases are not at all dissimilar to the cases involving military personnel and civilian employees which the US Claims Court now hears-- so that its judges would

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not require long periods of familiarization. It would be a comaratively simple matter, if adding the VA review jurisdiction to that court caused delays in litigation there, to add a few trial judges-- this instrument is flexible enough to be matched to the need--. Jurisdiction for review in the United States District Courts could also be provided, but if the route via the Claims Court were significantly more expeditious, most of the applications for review would be filed in the Claims Court.

5. Q Should there be concern for the costs to the taxpayer?

A I do not believe that this cost would be significant.

6. Q Prior to enactment of judicial review, would it be worthwhile to conduct a study of the existing VA adjudication process in an effort to see how it might be improved?

A Such a study would be worthwhile, but should not be used to delay enactment of judicial review. The absence of judicial review is a matter of principle, and not just a consequence of less-than-optimum functioning of the present VA adjudication process. If the implementation of such a study results in improvements of theVVA adjudication process, fewer veterans might resort to judicial review, and this would be all to the good; it should not, however, be viewed as an alternative.

7. Q How do we respond to the claim that granting judicial review would create an unacceptable burden on the federal court system?

A Testimony given by other members of the panel on which I testified showed their estimate that the number of actual judicial review cases would be relatively small. It would seem to follow that the burden would not be unacceptable. Furthermore, if the judicial system is so overloaded that it could not assume this burden, it needs general improvement and beefing up anyway.

8. Q If judicial review by federal courts is allowed, at which level should the review process begin?

A It should begin at the equivalent of District Court level, with submission to the United States Claims Court the preferred mode. Appeals should then go to the Circuit Courts of Appeal, in the case of cases begun in the District Courts, the appeal should be to the appropriate Circuit, and in the case of cases begun in the United States Claims Court, the appeals should lie to the United States Court of Appeals for the Federal Circuit. Hopefully, the speed with which cases are disposed of in the Claims Court will be sufficiently greater than those going to District Court, so that most veterans will choose the former route rather than the latter.

9. Q What role should attorneys play in the veterans pursuit of his claim?

A The veteran should have the option of being represented by an attorney at any stage, but economic incentives for such representation should be provided only at the intermediate stages of the VA process, so that veterans' initial claim determinations will generally be made without attorneys.

10. Q How should an attorney representing a veteran be compensated for his work?

A A scale of fees based on the amount and difficulty of the work, with a cap based on a percentage of the results-- but not on whether the benefits obtained are past due or prospective.

11. Q If veterans are given the option of hiring an attorney, what effect will this have on veterans organization representation?

A It will somewhat lessen the burden of free representation imposed on the veterans organizations. Many of them are also likely to restructure the manner in which they provide representation, in that the non-attorney veterans service officers are more likely to be in consultation with, or under the general supervision of, attorneys either employed by or cooperating with the veterans organizations. It should improve the quality of representation by veterans organizations.

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DAV

Motto: "If I cannot speak good of my comrade, I will not speak ill of him."

DISABLED AMERICAN VETERANS

NATIONAL SERVICE and LEGISLATIVE HEADQUARTERS
807 MAINE AVENUE, S.W.
WASHINGTON, D.C. 20024
(202) 554-3501

August 24, 1983

AUG 26 1983

Honorable G. V. Montgomery, Chairman
House Veterans Affairs Committee
335 Cannon House Office Building
Washington, D. C. 20515

Dear Chairman Montgomery:

I have received your letter dated August 16, 1983, wherein you pose certain questions relative to the Oversight Hearings that were conducted by the House Veterans Affairs Committee on July 21 and July 26, 1983 concerning the subject of judicial review of veterans' claims.

Our responses to your questions are attached.

Sincerely yours,

JOHN F. HEILMAN
National Legislative Director

JFH:ar
Attachment

JUDICIAL REVIEW

1. Should there be concern over possible costs (attorneys' fees, court costs, expert testimony, etc.) to the veteran seeking judicial review of his claim, especially since he has no way of knowing whether he will prevail in the end?

Yes, these costs very definitely should be a matter of concern to the Committee as it examines the issue of judicial review--especially judicial review in the federal district court system as is proposed by the pending Senate passed bill (H.R. 2936, as amended). This measure, as you know, negates the present $10 fee limitation that applies to private attorney representation in VA proceedings. It does not bar the payment of fees (by veterans to attorneys) for representation that does not result in a favorable decision. These fees, together with fees attributed to representation in non-VA proceedings (federal district courts) could indeed be quite high. Considering the length of time an appeal could take in both VA and non-VA proceedings, a veteran could easily have over two years worth of private attorney representation to contend with when the "bill comes due."

As you are aware, the Disabled American Veterans opposes any change in the current fee limitation for private attorney representation in VA proceedings. We do not object to allowing the payment of reasonable private attorney fees for representation that is provided in non-VA proceedings.

2. Should the appellate court be allowed to hear the case de novo or should the review be limited to the record established during the administrative process?

As stated in our formal testimony, the DAV does not support judicial review of adverse VA benefit determinations in the federal district court system. We prefer, in accordance with a mandate received from the delegates to our most recent National Convention, to have such review through the creation of an independent Court of Veterans Appeals--such Court being composed of judges appointed from civil life by the President and subject to confirmation by the Senate. Review of adverse VA benefit determinations would be the sole responsibility of such a Court.

To answer your question, we do not believe that de novo review is necessary or warranted by whatever judicial review authority the Congress may create. Limiting review to the record established during the instant VA proceedings should suffice.

3. Would you be in favor of a proposal that would eliminate the Board of Veterans Appeals and allow judicial review of Regional Office decisions?

No we would not be in favor of the elimination of the Board of Veterans Appeals. The annual allowance rate of BVA decisions has been running anywhere from 11% through 13% in recent years. Also, many cases remanded by BVA for further development back to the local agencies of jurisdiction do result in favorable decisions at the local level, after such development has occurred.

BVA therefore provides a level of redress in the VA system that is favorable to thousands of claimants. Also, eliminating BVA and allowing judicial review of local decisions would greatly increase the case load of the judicial review entity which the Congress may create--this would be most undesirable.

4. It is estimated that the median time from filing to disposition of cases in federal district courts is approximately 14 months. Should this time requirement be a consideration in determining whether or not judicial review is in the best interest of the veteran?

Yes, it should and this factor, among others addressed in our formal testimony, is one of the reasons we believe that an independent Court of Veterans Appeals would be the best provider of judicial review of adverse VA benefit determinations.

5. Should there be concern with the cost to the taxpayer which may result from enactment of a judicial review statute?

In terms of judicial review in the federal district court system, the only taxpayer costs we can foresee would be those administrative costs associated with the handling of the new case loads. Just how much this would be is difficult to say. Creation of an independent Court of Veterans Appeals, as proposed by the DAV, would require a modest increase in federal expenditure.

6. How do you respond to the claim that granting judicial review would create an unacceptable burden on the already overloaded federal court system?

As stated in our formal testimony before the House and Senate Veterans Affairs Committees and as implied above, we do believe that the increased case load to the federal court system is a negative factor, one that supports our own proposal for creation of an independent Court of Veterans Appeals.

7. If judicial review by federal courts is allowed, at which level (District Court or Court of Appeals) should the review process begin?

As we do not favor placing judicial review in the federal court system, we defer answering this question to those who do.

8. What role should attorneys play in the veteran's pursuit of his claim, i.e., at what stage of the process should the veteran be represented by an attorney?

As stated above, in view of the free, expert, nationwide corps of service officer representation that is available to all VA claimants from the national veterans' organizations, we do not support any change in the current limitation that applies to private attorney representation in VA proceedings. To authorize such a change would be tantamount to siphoning millions of dollars in disability compensation/DIC/pension benefits out of the pockets of disabled veterans and their families and into the pockets of private attorneys. If private attorneys wish to continue to provide representation to VA claimants in VA proceedings (as some of them now do), then they can do so through their "pro bono" case work.

9. How should an attorney representing a veteran be compensated for his work?

Private attorneys representing veterans in any judicial review process the Congress may enact should be allowed to collect reasonable fees. We would hope that such fees would be subject to approval by an appropriate entity to ensure fairness.

10. Assuming the veteran is given the option of hiring an attorney, what effect will this have on the representation currently being provided by the veterans' organizations?

If the fee limitation regarding private attorney representation in VA proceedings were to be lifted, we do not believe that any long-standing, appreciable impact would be felt by the veterans' service organizations. That is to say, in view of the magnitude of present and future VA claimants, we do not believe that our case loads would be reduced to any significant degree. The big losers would be those thousands of present and future VA claimants who would "purchase" private attorney representation that is no better than the free representation available to them from accredited service officers of the veterans' organizations.

Regarding private attorney representation in non-VA proceedings, if the judicial review method chosen is in the federal district court system, then veteran claimants would be denied the right of continuing to use service organization representation, as most service officers are not attorneys. This is another reason for having judicial review via an independent Court of Veterans Appeals (our bill, H.R. 649, which would create such a Court, would allow both private attorneys and accredited service organization representatives to represent VA claimants).

Office of General Counsel Washington D.C. 20420

Veterans
Administration

SEP 01 1983

August 31, 1983

In Reply Refer To: 022

Honorable G.V. (Sonny) Montgomery
Chairman, Committee on Veterans' Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We are enclosing our responses to the questions pertaining to the issue of judicial review of veterans' claims which you enclosed with your letter of August 16, 1983.

Sincerely yours,

John P. Murphy

JOHN P. MURPHY
General Counsel

Enclosures

Question 1: What is VA's estimate of the number of cases which would be filed in Federal court each year?

Answer 1: It is extremely difficult to estimate the number of cases which may be filed each year in Federal courts, if individual VA benefit decisions are to be subject to judicial review. The number of cases filed will depend on how any legislation enacted addresses a variety of factors. Some of these factors are:

1. the court in which review is authorized, i.e., review by a special court of veterans' appeals, by Federal District Courts, by the United States Claims Court or by the United States Circuit Courts of Appeal;

2. the type of review authorized, i.e., de novo or on the record;

3. the scope of review, i.e., review of questions of law only, or review of both questions of law and fact;

4. the standard for any factual review authorized, again whether the court's review is to be de novo or some limited form of review such as the substantial

evidence test, the arbitrary and capricious test or a new standard such as the "rational basis" test as embodied in H.R. 2936;

6. whether exhaustion of administrative remedies is required;

7. the period of time in which a suit may be filed;

8. the cost to bring the suit, including the amount an attorney may charge for representing a claimant in court; and

9. whether the right to bring suit is only prospective, or if not limited to prospective application, how far back the right will extend.

Accordingly, in the absence of any specific legislative proposal, it is not possible to estimate the number of cases that may be filed in Federal courts. We have, however, estimated the anticipated number of cases that may be brought if the legislation to provide judicial review that was passed by the Senate as H.R. 2936 were enacted into law. Based on an estimated Board of Veterans Appeals denial rate of about 60% and using the 20% Social Security system rate of appeals to the courts as a model, we anticipate that approximately 4,100 veteran cases would be filed annually in Federal court.

Question 2: There have been various standards of review advanced in the several bills pending in the House. Would it make a significant difference which standard is adopted such as substantial evidence, arbitrary and capricious, rational basis?

Answer 2: We do not believe a significant difference would result from adoption of any particular standard for court review of VA fact findings. The legal community itself remains undecided on such basic questions as whether the arbitrary and capricious standard and the substantial evidence test are equivalent, and if not, which test calls for the broader standard of review. Likewise, the use of a standard employing the term "rational basis" presents the very real possibility that this concept may be equated with the nebulous arbitrary and capricious standard. The United States Supreme Court and several courts of appeal have indicated that a rational basis for agency action is all that is required to meet the arbitrary and capricious standard.

Further, the differences between standards of review of agency action may be largely semantic, and the real test of the validity of an agency decision may be its reasonableness. K. Davis, Administrative Law Treatise, § 29.00

(Supp. 1982). Despite fine differences in statutory language, the scope of judicial review of an action is likely to depend on factors such as the judge's perception of the conscientiousness and fairness of the administrative decision maker. If the court lacks confidence in an administrator, it may be prone to substitute its judgment for that of the agency. K. Davis, Administrative Law of the Seventies, § 29.00 at 649 (1976). As stated by Professor Davis ". . . judicial judgment about how much to review any particular case overrides whatever slight effect the verbalisms may have." K. Davis, Administrative Law Treatise, § 29.00 at 533 (Supp. 1982).

It is this willingness of the courts to disregard statutory distinctions that raises our concern that any standard of review involving factual aspects of VA benefit decisions will open the door to unwarranted judicial intervention and provides one of the reasons for our opposition to judicial review.

Question 3: What effect would judicial review have on the right of the veteran to have his cases transferred or reopened?

Answer 3: The VA has stated on several occasions that our liberal policy of reopening a denied claim on the basis of new evidence would continue, notwithstanding judicial affirmation of the denial. The claimant would need to present new evidence to the Regional Office for the purpose of reopening the claim. If either the right to reopen or the benefit claimed were denied, the claimant would have the usual right of appeal to the Board of Veterans Appeals.

With respect to reconsideration of a Board decision, however, judicial affirmation of the denial would likely preclude an administrative allowance under 38 C.F.R. 19.5(B) based on a difference of opinion.

Question 4: What is your reaction to the DAV's recommendation that "an in-depth study of Central Office and Board of Veterans Appeals decisions be conducted by an independent (non-VA) entity. . . . before any judicial review legislation is finalized"?

Answer 4: We do not believe that a study such as proposed by DAV would be practical or serve a useful purpose. DAV indicated that a study is needed to determine a number of questions. The first is how prevalent decisions are that can be characterized as arbitrary and capricious. Any study to achieve such a result would require a review of a very large number of appellate decisions and would be extremely unwieldy. It must be recognized that to achieve any worthwhile results, the review of each decision would require more than merely reading the BVA decision. The review of each case would require an indepth examination of all aspects of the case, in effect, a readjudication of each case reviewed.

Another practical problem with such a study stems from the fact that claim processing is a highly technical area. The majority of cases requiring Central Office review and many submitted to BVA involve complex or novel issues. Resolving these issues requires extensive knowledge of VA law and procedures and the ability to apply general legal and medical principles to specific problems. We are aware of no "independent (non-VA) entity" qualified to study these decisions.

In the absence of any indication of significant abuse in our adjudicative and appellate processes, there appears to be little need for such a study. We would also note that, at present, if a Board decision is believed to represent an abuse of authority, the case can be brought to the Chairman's attention and reconsidered. The number of reconsiderations requested, however, is not large (fiscal year 1982; 35,771 BVA decisions, 350 reconsiderations). This suggests that questionable decisions are not prevalent. Likewise, there appears to be no need for a study to determine the most common issues on appeal to BVA. The Board maintains statistics concerning the most common issues encountered. In addition, the Appellate Index and Retrieval Staff (AIRS) of the Board maintains a complete breakdown of all issues by subject matter along with their frequency. Since July 1977, the index to Board decisions has been published and distributed to all elements of the agency as well as many service organizations and other public interest groups. This provides an additional safeguard ensuring that appeals are handled in a fair and equitable manner.

Finally, we believe that a study to determine whether the vast volume of appeals have merit or can be attributed to the VA's appellate system being "cost free" and completely accessible to all claimants would provide little useful information. If the cost free nature and accessibility of our appellate procedures are determined to be the prime factor in the large number of appeals, the VA, and we assume both Congress and the DAV, would not want to alter this merely to reduce the volume of appeals. On the other hand, the only remediable cause for the high volume of appeals that might be determined by such a study would be poor adjudication at the regional office level. This, however, has never been demonstrated, and the Board's allowance rate (13% in fiscal year 1982) suggests that regional office adjudication is quite sound.

Veterans Due Process
P.O. BOX 68237 PORTLAND, OREGON 97268-0237
(503) 659-9912

August 26, 1983

The Honorable G. V. Montgomery
Chairman
Committee on Veterans' Affairs
U.S. House of Representatives
335 Cannon House Office Building
Washington, D.C. 20510

SEP 1 1983 ~~AUG 31 1983~~

Dear Congressman Montgomery:

It was good to see you and speak briefly with you on August 23rd, in Seattle.

As the Executive Director of Veterans Due Process, Inc. I would like to preface our answers to the eleven questions from the Veterans Affairs Committee, pursuant to the Judicial Review hearings conducted in Washington, D.C. on July 21 & 26, 1983, by stating the concern expressed by many of the members of our national Advisory Committee. Typical of responses is the following:

> "In all those questions, there is no mention of a request for an opinion on if Judicial Review will help the veteran. The only thing that seems to be on the mind of the questioner is whether this will result in more money being spent by the taxpayer."

It is unfortunate for the veteran that the primary concern when it comes to justice for the veteran continues to be costs, rather than justice. That attitude was perhaps best expressed in the words of the V.A. Administrator in a letter written in 1952 in connection with the policies necessitating the "No Review Statute" to a Subcommittee of the House Committee on Veterans' Affairs. One of the primary purposes identified was:

> "To insure that veterans benefits claims will not burden the courts and the Veterans Administration with expensive and time consuming litigation."

QUESTIONS AND ANSWERS

1. Should there be concern over possible costs (attorney's fees, court costs, expert testimony, etc.) to the veteran seeking judicial review of his claim, especially since he has no way of knowing whether he will prevail in the end?

The veteran who has been wrongfully or illegally denied benefits to which he or she is entitled by statute law, and who consequently seeks judicial review of his claim, should be as concerned over possible costs (attorneys' fees, court costs, expert testimony, etc). as are other citizens of the United States who seek to correct errors made by other agencies of the Federal Government who also have no way of knowing for sure whether he will prevail in the end. Life is full of risks and chances, but you only get what you pay for.

Veterans injured in our nation's wars can attest to the risks and chances which exist on the battlefield. Lawsuits also contain chances and risks. Sometimes you win and sometimes you don't win. It is, of course, going to cost more to bring a complex case to a successful conclusion, but an attorney will be able to tell the claimant something about his prevailing in the case. The pending legislation is also carefully structured in such a way as to ensure that, for the most part, only meritorious cases will be brought before the courts. It is also obvious that attorneys will not take cases on a contingency basis which they know are not meritorious, and that they cannot win.

2. Should the appellate court be allowed to hear the case de novo or should the review be limited to the record established during the administrative process?

YES. The evidentiary gaps which occur in many V.A. cases could create a very expensive and time consuming process of remands. The V.A. makes mistakes on the most basic level of these cases, and it is sometimes necessary to go back to the beginning and start fresh. Courts should be allowed to make a searching review of the matter.

3. Would you be in favor of a proposal that would eliminate the Board of Veterans Appeals and allow judicial review of Regional office decisions?

YES. Out of respect for the public purse, we would be in favor of eliminating the BVA, inasmuch as a couple of already expensive hearings at the regional office level (perhaps with different hearing panels) allows the V.A. ample time to ensure that its decision is consistent with the facts and applicable laws.

The BVA is an expensive "paper review" (claimants cannot, for the most part, afford to attend) and approximately 90% of the cases are denied. The elimination of the BVA would encourage the regional offices to ensure that the demands of justice and law are met.

4. It is estimated that the median time from filing to disposition of cases in federal district courts is approximately 14 months. Should this time requirement be a consideration in determining whether or not judicial review is in the best interest of the veteran?

NO. The 14 months is time to trial. A veteran's attorney could seek preliminary relief for the veteran or move for a preliminary injunction, and the merits of the court's preliminary determination could be heard at a later date. In that respect, it could be a great improvement over the existing system. We know of veterans who have waited for decades (50 years in one case) for relief from what the veterans consider to be wrongful or illegal V.A. decisions. Justice delayed is better than no justice at all. Many V.A. cases take substantially longer than 14 months to be decided. Judicial review will be the difference between winning and losing on many of these cases.

It would be nice to have all these cases decided quickly. However, it is not in the veteran's best interest to have the cases be finished quickly at the price of him "losing" the case.

5. Should there be concern with the cost to the taxpayer which may result from enactment of a judicial review statute?

> The cost impact must, of course, be balanced with the benefit, but the benefit far outweighs the cost in this matter. There will be considerable cost savings under the new alignment. Attorney involvement will save a lot of administrative time. Under the present system, the V.A. is forced to deal with numerous veterans who are not familiar with the workings of the law, and do not know what they are doing. They take up a lot of the V.A.'s time in matters which are not necessarily important to the outcome of the case. With attorney involvement, the facts would be developed by the claimant, and the V.A. could adjudicate, thus saving the taxpayer money. Congressional offices would probably also save a lot of time now being expended concerning veterans' claims with the V.A.
>
> One of the results of judicial review, aside from saving taxpayers money, will be that many veterans will win cases, who lose them under the existing system.

6. Prior to enactment of judicial review, would it be worthwhile to conduct a study of the existing VA adjudication process in an effort to see how it might be improved?

> NO. such a study would result in additional delays and waste a lot of taxpayers' money with no benefit. Judicial review is necessary no matter how many improvements take place at the V.A. The V.A., and many other people, already know what the problems are -- budgetary constraints. Judicial review will result in greater uniformity of decision making, and eliminate abuses of discretion. The outside scrutiny of V.A. operations, achieved through judicial review and attorney involvement, will improve the entire V.A. system, and will result in considerable savings to the taxpayers, and a more equitable system for the veteran.

7. How do you respond to the claim that granting judicial review would create an unacceptable burden on the already overloaded federal court system?

> It is felt that the marginal impact of new cases will be negligible. Our nation's wars created an unacceptable burden of responsibility on the shoulders of many veterans. Wars cost money too. We must take care of the wounded, no matter what the cost. The injured veteran is now at the mercy of politics. The veteran who served his country should be the first to enjoy the benefit of our constitutional form of government, especially Due Process of Law protections. The courts of our nation should have never been closed to them, that was the "unacceptable burden."

8. If judicial review by federal courts is allowed, at which level (District Court or Court of Appeals) should the review process begin?

> The review process should begin at the district court, especially in a case of de novo review. The court of appeals are not structured in such a way as to handle these types of cases as the initial judicial step. Also, there are so few circuit courts that the veteran would probably have to travel. The V.A. lower level now polices itself. That is, the same person who rejects the initial claim at the first level, is then asked to review his own decision to see if he has made any mistakes.

9. What role should attorneys play in the veteran's pursuit of his claim, i.e., at what stage of the process should the veteran be represented by an aattorney?

An attorney can be vital at every stage in the veteran's pursuit of the claim. The veteran should be allowed the freedom of choice to have an attorney at any stage he wants to. Inasmuch as BVA hearings are limited to the record developed below, it can be very important to the veteran that said record be developed properly from the beginning -- especially in complex cases. Professionals (attorneys) are trained in gathering and presenting such evidence in such a way as to maximize success.

10. How should an attorney representing a veteran be compensated for his work?

An attorney should be compensated, depending on how much work he does for the particular claim. Some claims demand more work than others. A standard contingency fee arrangement of 25-33% of back benefits, as in other cases before other agencies, would probably be in order. If the percentage of the back check at the time the disability is granted does not compensate the attorney fairly for his time and work, he should be granted a smaller percentage of the veteran's monthly check until the attorney's fees have been paid off. It is true that 75% of something is better than 100% of nothing, which is now often the case for veterans, as a result of no judicial review or attorney involvement.

11. Assuming the veteran is given the option of hiring an attorney, what effect will this have on the representation currently being provided by the veterans organizations?

The representation currently being provided by the veterans organizations will improve in quality. They will probably hire more attorneys to handle complex cases. Veterans will probably choose to go with attorneys in complex cases, which would result in only a slightly diminished role for the veterans organizations. In routine, uncomplicated cases, the veterans would probably choose representation by a service organization, as said services are available to the veteran "free of charge."

All of the veterans organizations in America (except the "leadership" of the American Legion) are now in favor of changing the existing system of justice available to veterans. The reason is because they are concerned about what is good for the "veteran." They wish to maximize the veteran's chances of winning his V.A. case, even if it is necessary to take the V.A. to court. They know that the time for Judicial Review for veterans has come. We earned our rights.

P.S. We are informing the rank and file members of the American Legion of what is going on concerning veterans' rights. I had numerous conversations in Seattle with members of the Legion who were shocked by the existing system. Many asked for extra copies of our fliers to distribute back in their home states. We passed out thousands of copies. We must now make sure that the American people learn what is going on here, so that they can get involved.

cc: Full distribution.

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

SEP 07 1983

September 5, 1983

The Honorable G. V. Montgomery, Chairman
Committee on Veterans Affairs
United States House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

Enclosed you will find responses to the questions pertaining to the issue of judicial review of veterans' claims we received as a follow-up to the July 21, 1983 oversight hearing.

Please find enclosed, also, a copy of Resolution No. 602, entitled "Judicial Review." The resolution, adopted at our most recent National Convention, is provided for your review in that it differs somewhat from the resolution on which our testimony was based and in response to The Honorable Nancy L. Johnson's question regarding our position on a separate Court of Veterans Appeals.

In addition, Mrs. Johnson also requested information with respect to the need for instituting judicial review of administrative decisions of the VA. In responding, we must point out that we do not believe the present system of adjudication of claims has failed and we do not believe, as well, that this fact should be held as a reason to deny the implementation of judicial review. Our support of judicial review has, as you know, evolved over a number of years. It is the result of a general consensus among the membership of our organization and our constituency, where the view has become that the claimant is involved in a highly legalistic process, the logical/natural end to which lies in relief/redress in the courts, if desired. The majority of cases entertained before the Board of Veterans Appeals are adverse determinations, and our staff is increasingly called upon by claimants for advice as to whether access to the courts is available. Our government was established on the premise and with the intent that our laws would provide protection for all citizens, and such is not currently the case with respect to claims of veterans. And, if for no other reason, our mandate clearly reflects the desire of our own constituency in this regard.

With best wishes and kind regards, I am

Sincerely yours,

Donald H. Schwab

DONALD H. SCHWAB, Director
National Legislative Service

Enclosures

★ WASHINGTON OFFICE ★
VFW MEMORIAL BUILDING ● 200 MARYLAND AVENUE, N.E. ● WASHINGTON, D. C. 20002 - 5799 ● AREA CODE 202-543-2239

Question #1 - Should there be concern over possible costs (attorneys' fees, court costs, expert testimony, etc.) to the veteran seeking judicial review of his claim, especially since has has no way of knowing whether he will prevail in the end?

Response #1 - These concerns are not unique to veterans who seek redress in the courts - all plaintiffs would have similar concerns in any form of litigation. We contemplate, insofar as our resolution is drawn, that there would be little "expert testimony" in a review of law and regulation; our resolution does not contemplate de novo review, and it appears that such testimony would be more appropriate to de novo review. We do not object to the veteran absorbing reasonable court costs that may be assessed similar to those of any plaintiff before the court.

Question #2 - Should the appellate court be allowed to hear the case de novo or should the review be limited to the record established during the administrative process?

Response #2 - It is generally understood that a de novo review would be of the record established during the administrative process. With this in mind, we continue to advocate against de novo review; we do support review of matters related to questions of law and regulation.

Question #3 - Would you be in favor of a proposal that would eliminate the Board of Veterans Appeals and allow the judicial review of Regional Office decisions?

Response #3 - We oppose the abolition of the Board of Veterans Appeals. We refer you to Page 1 of our testimony, wherein we state: "In supporting judicial review, however, the VFW is not being critical of the VA's claim processing apparatus, including the Board of Veterans Appeals (BVA). We have praised its performance in the past and do not see any reason to alter this support. The Board, under constant pressure from mounting workloads and the increasing complexity of its cases (such as radiation and herbicide exposure claims), renders for the most part, fair and equitable decisions."

Question #4 - It is estimated that the median time from filing to disposition of cases in federal district courts is approximately 14 months. Should this time requirement be a consideration in determining whether or not judicial review is in the best interest of the veteran?

Response #4 - We do not believe the question of the time frame of a final outcome of the review process in a federal district court should be the essence of the question. Irrespective of the time frame, the veteran should be allowed to make the determination whether he concurs with the decision in the administrative process or he feels compelled to seek review or relief in the courts.

Question #5 - Should there be concern with the cost to the taxpayer which may result from enactment of a judicial review statute?

Response #5 - Although additional cost to taxpayers will occur, it constitutes a secondary consideration to what we believe to be the exercise of constitutional rights that veterans have borne arms to preserve. In fact, veterans compose a significant part of the taxpayer constituency. Nor do we believe taxpayers in general would object to the cost where veterans are permitted to exercise the same rights enjoyed by other federal beneficiaries.

Question #6 - Prior to enactment of judicial review, would it be worthwhile to conduct a study of the existing VA adjudication process in an effort to see how it might be improved?

Response #6 - Although the existing VA adjudication process has been reviewed from time to time for the purpose of instituting improvements, we do not object to such a study. However, we do not believe such a study, or improvements implemented thereby, should mitigate against the timely enactment of judicial review of administrative decisions of the VA.

Question #7 - How do you respond to the claim that granting judicial review would create an unacceptable burden on the already overloaded federal court system?

Response #7 - Although we understand that such a review will create some burden (the extent of which we cannot estimate) on the court system, the overriding issue remains equity under the law for veterans, their dependents and survivors.

Question #8 - If judicial review by federal courts is allowed, at which level (District Court or Court of Appeals) should the review process begin?

Response #8 - We believe the veteran should be allowed to enter the court system at the U.S. District Court level. Administrative determinations are initiated at the local and most accessible level; similarly, in judicial review, the veteran should enter the court system at the most local and accessible level, thereby, firstly, minimizing the cost to counsel, the veteran and the government and, secondly, assuring the most timely response.

Question #9 - What role should attorneys play in the veteran's pursuit of his claim, i.e., at what stage of the process should the veteran be represented by an attorney?

Response #9 - Attorneys should necessarily be representing veterans at the court or review level; prior to that level, the discretion of the veteran should prevail, although we do not recommend any change to existing law with respect to attorney's fees at the administrative level.

Question #10- How should an attorney representing a veteran be compensated for his work?

Response #10- Attorneys' fees similar to those set forth in S.636, as more fully described in Senate Report 98-130, appear to be a reasonable response to both protecting the veteran and providing adequate remuneration to attorneys. Compensation for attorneys, as long as such fees are generally acceptable to all parties and where the interests of veteran claimants and attorneys are equitably served, is not considered objectionable to us.

Question #11 - Assuming the veteran is given the option of hiring an attorney, what effect will this have on the representation currently being provided by the veterans organization?

Response #11 - If a system of judicial review is enacted authorizing such at the federal court level, we anticipate little or no adverse effect or results in the administrative process on representation by veterans' organizations.

Hypothetically, were legislation enacted whereby attorney representation of veterans was made more appealing in the administrative process, the negative effects would still be considered negligible on veterans organization representation. Such organizations are generally recognized in the community as the staunchest veteran advocate in the administrative forum, possessing the expertise to secure the best possible result therein. In addition, those services offered are gratuitous, thereby having considerable appeal to claimants.

Resolution No. 602

JUDICIAL REVIEW

WHEREAS, Section 211, Title 38, United States Code, provides that decisions of the Administrator of Veterans Affairs on any question of facts or law under any law administered by the Veterans Administration providing benefits for veterans, their dependents or survivors are final and conclusive and are not subject to review by any other official or court of the United States; and

WHEREAS, this section, in effect, denies veterans and their beneficiaries the same rights possessed by citizens in decisions of entitlement under other federal programs; and

WHEREAS, the principle of judicial review of VA benefit decisions has, historically, evoked controversy and widespread debate in Congress and elsewhere; and

WHEREAS, the Veterans of Foreign Wars, being keenly aware of its obligation to this nation's veterans and their survivors has, as mandated, urged Congress to permit access to the United States courts of law with regard to VA benefit determinations; now, therefore

BE IT RESOLVED, by the 84th National Convention of the Veterans of Foreign Wars of the United States, that we reaffirm support for legislation which would provide judicial review in an appropriate U.S. District Court of Veterans Administration benefit claims determinations concerning questions of law and regulation; and

BE IT FURTHER RESOLVED, that the $10.00 attorney fee currently in effect under 38 USC 3404(c) be retained.

Adopted by the 84th National Convention of the Veterans of Foreign Wars of the United States held in New Orleans, Louisiana, August 12-19, 1983.

VIETNAM VETERANS OF AMERICA
329 EIGHTH STREET NE, WASHINGTON, DC 20002 ★ 202/546-3700

August 30, 1983

G.V. (Sonny) Montgomery, Chairman
United States House of Representatives
Committee on Veterans' Affairs
335 Cannon House Office Building
Washington DC 20515

Dear Chairman Montgomery:

The Vietnam Veterans of America is grateful for the opportunity to reply to the questions enclosed with your letter of August 16, 1983. Set forth below are VVA's responses in the order enumerated in your August 16th letter.

1. Litigation Costs. There should be no more concern over possible litigation costs incurred by a veteran seeking judicial review of his claim than there should be for other citizens seeking review of federal agency action. Many veterans who depend upon benefits provided by the Veterans Administration are poor. Congress should ensure that these veterans have access to free legal counsel by adequately funding the Legal Services Corporation, the entity created by Congress to ensure that low-income citizens have equal access to justice as more wealthy citizens. In addition, it is likely that veterans groups will hire attorneys to represent veterans if Congress authorizes judicial review of VA determinations. Thus, low-income veterans will likely be able to obtain free representation from a legal services office or a veterans organization.

As far as court costs are concerned, low-income veterans should be able to avoid payment of traditional court costs like filing fees by filing a motion to proceed *in forma pauperis*. Courts have traditionally excused low-income citizens from payment of court costs like filing fees by granting such motions pursuant to 28 U.S.C. § 1915.

With regard to other litigation costs like those associated with depositions and expert witnesses, there should be no concern if judicial review is authorized. The various bills authorizing court review that have been introduced all require the court to review only the record created by the VA. These bills preclude introduction of new evidence to the Court. Thus, there will be no need for depositions or expert witnesses. Court review of VA determinations will therefore be relatively low cost.

VVA does believe that there should be Congressional concern about ensuring that veterans who are ineligible for Legal Services Corporation assistance have access to attorneys if judicial review is authorized. One way to ensure such access is through the extension of the Equal Access to Justice Act, which authorizes court awards of attorneys fees to citizens who prevail in legal actions in which the agency's position in court is unreasonable. Another commonly used method to ensure that the cost of litigating in federal court does not deter citizens from bringing meritorious lawsuits is for lawyers to represent citizens on a contingency basis. It is likely that attorneys will represent veterans on this basis if judicial review is allowed. This will ensure that cases with merit are brought to court, with the corollary beneficial effect that cases without merit will be discouraged because lawyers will not be willing to take the case on a contingency basis. VVA does not oppose Congressional attempts to place a ceiling on the percentage of the recovery that a lawyer could retain when representing a veteran on a contingency basis, as long as the ceiling is not so low that it will discourage attorneys from taking meritorious cases.

2. The Scope Of Judical Review. The deeply imbedded principle established by the Administrative Procedure Act is that court review of federal agency action should not be *de novo*, but should rather be limited to the record established during the administrative process, unless the administrative fact-finding process was inadequate. VVA beliefs that this long-standing precept should apply to court review of VA determinations as well.

3. The Board Of Veterans Appeals. VVA would not be in favor of a proposal that would eliminate the Board of Veterans Appeals and allow judicial review of regional office decisions. The Board of Veterans Appeals does correct many regional office errors and creates a certain degree of consistency through its review of regional office decisions. By establishing an agency appeal procedure, Congress has provided a limited safeguard against arbitrary decision-making. However, the Board of Veterans Appeals, like other agency appellate forums, sometimes makes mistakes, including errors on issues of law. The establishment of judicial review of BVA determinations will provide a further safeguard against erroneous decision-making.

4. The Time It Takes To Litigate Cases In Federal District Court. VVA does not believe that the amount of time it normally takes to litigate a case in federal district courts should be a consideration in determining whether judicial review is in the best interest of the veteran. The reason for this

position is simple. Judicial review merely provides an additional remedy for veterans who have been denied relief by the Board of Veterans Appeals. Under the proposed legislation, a veteran can only seek court review after all VA agency appeals have been exhausted. Allowing judicial review is in the best interest of the veteran no matter how long it takes for federal district courts to resolve such a lawsuit because the opportunity for judicial review provides veterans with a chance for obtaining veterans benefits that they would not have without judicial review.

5. The Cost To The Taxpayer. VVA believes that the cost to the taxpayer of providing judicial review would be small and that those testifying who have complained about the cost to the taxpayer have overestimated what the cost will actually be. The main reason that those who oppose judicial review have overestimated the cost is that they analogize judicial review of VA determinations to review of Social Security Administration cases. As our July 1983 testimony demonstrated, for decades veterans have been able to obtain court review of Board for Correction of Military Records ("BCMR") and Discharge Review Board ("DRB") decisions. The decisions of these Boards are often on issues such as character of discharge and entitlement to military disability benefits -- the same type of issues decided by the VA. Thus, court review of DRB and BCMR decisions provides a far closer analogy than court review of SSA decisions with regard to we can expect if court review is allowed. For decades, less than 100 veterans have annually sought court review of the thousands of Board for Correction of Military Records and Discharge Review Board decisions that are rendered annually. This demonstrates that the impact on the court system of judicial review is not likely to be great.

Another factor that will limit the number of cases brought relates to the quality of Board for Veterans Appeals decision-making. The Veterans Administration states that the BVA does an excellent job in deciding veterans' claims. If this is true, it is not likely that many veterans will seek court review. Attorneys will not represent veterans if the case does not have merit because the fee agreement with the veteran is likely to be on a contingency basis and lawyers will not be willing to represent the veteran on a contingency basis unless the case has merit. For the foregoing reasons, the figures provided by opponents of judicial review concerning the number of cases that can be expected to be filed are greatly exaggerated.

6. A Study Of The Existing VA Adjudication Process. It would not be worthwhile to conduct a study of the existing VA adjudication process prior to enactment of judicial review. This is because the justification for judicial review is unrelated to the quality of the existing VA adjudication process. No matter how good such an agency's adjudication process is, there will always be mistakes in the adjudication process because it is run by human beings. Without review by an independent tribunal, it

will remain a closed system, insulated from independent oversight. This is not healthy no matter how well-run the agency system is.

7. The Burden On The Federal Court System. See our response to inquiry number 5 above.

8. The Appropriate Court For Judicial Review. If judicial review by federal courts is allowed, the review process should begin in a federal district court. The federal district courts are the level at which most cases seeking review of federal agency action are initiated, and VVA does not believe there are any legitimate reasons to have the review level start at the Court of Appeals. Review in a district court involves one judge, rather than the three judges that review all Court of Appeals cases. Thus, the district court process is less costly to the taxpayer. In addition, because there are more district courts nationwide, veterans will have easier access if review begins at the district court level.

9. The Introduction Of Attorneys Into The Administrative Process. VVA believes that attorneys should be allowed to represent veterans at every stage of the VA adjudicative process. Veterans should be provided with freedom of choice over whom their representative should be and when their representative should be able to assist them. Moreover, attorneys are especially needed at the beginning of the VA adjudicative process for veterans who are pursuing complicated claims. In a complicated case, lawyers are often necessary to ensure creation of a proper record. If the administrative record has already been created before an attorney is first permitted to become involved, it will sometimes be too late for the attorney to correct errors or enhance the veteran's probability of success.

10. Attorney Compensation. VVA believes that the free market should control how much an attorney should be compensated for representing a veteran either in federal court or in any part of the administrative process before the Veterans Administration. The limitations in the currently pending House bills are too low. If these bills are enacted without amendment, most attorneys will not be willing to represent veterans who have meritorious claims. There is no reason to believe that veterans need more protection from attorneys than other classes of citizens. Moreover, the considerations that underlie the motive to regulate the attorney-veteran relationship can be adequately addressed through the suggestions discussed in the response in paragraph 1 above.

11. The Effect On Veterans Organizations Of The Option Of Hiring An Attorney VVA believes that if veterans are given the option of hiring an attorney, it will have a beneficial effect on the representation currently being provided by the veterans organization. First, by providing another resource for

veterans, it should reduce the work load of the already overburdened veterans organizations. Therefore, the quality of representation the veterans organizations will be able to provide will likely be enhanced. Secondly, the availability of attorneys will encourage veterans organizations to utilize a heretofore unused resource. Because attorneys and veterans organizations will be likely to ventilate their advocacy theories and strategies together, a higher quality of veterans representation should ultimately result. VVA has experienced this beneficial effect first-hand. It has established a claims program in which the assistance of attorneys is an integral part. VVA believes that its claims program has been greatly enhanced by attorney participation.

If there are any further questions you have or any additional information you would like, please feel free to contact me. Thank you again for the opportunity to respond to these areas of inquiry.

Sincerely,

John Terzano

The University of Dayton

August 20, 1983

Hon. G. V. (Sonny) Montgomery, Chairman
U.S. House of Representatives Committee on Veterans' Affairs
335 Cannon Office Building
Washington, D.C. 20515

Dear Representative Montgomery:

I am more than pleased to supply responses to the questions you have presented as follow up to the July 21 and 26, 1983 oversight hearings. Thank you for your interest and concern.

> 1. You indicate that the fear which some veterans organizations have concerning a possible weakening of their ability to advise and counsel veterans is an unrealistic fear. Do you believe this is true in light of the need which you also discuss for "an attorney who is trained and skilled in gathering and presenting inconclusive and complex evidence to an administrative agency, and building a record for possible appeal..."?

Ans: The vast majority of the claims processed by the Veterans Administration are routine and do not involve critical or disputed issues of fact or injury characterization. In all of those cases I think the service representatives can supply extremely helpful advice and counsel because they are familiar with the procedures, the ritual terms and the methodology of the VA. Since their services are for all intents and purposes free, it is doubtful that any veteran is going to seek an attorney to represent him. It is only the unusual or first impression type of case which may involve a statutory ambiguity or an unusual or tricky characterization problem which the veteran might prefer to have handled by an attorney. We think, in such a case, the veteran ought to have that option.

> 2. Information reflects that in 1982 the median time of filing to disposition of cases in the U.S. District Courts was some 14 months. In view of this time requirement, might it not be best to allow the direct appeal of an adverse VA Regional Office decision, thereby eliminating the time and expense of going through the Board of Veterans Appeals (which now involves some 16 months)?

SCHOOL OF LAW
Administrative Offices
300 College Park Dayton, Ohio 45469-0001 (513) 229-3211

Ans: There is a certain amount of appeal to the proposition that a veteran should get swift judicial review of an adverse determination by a VA Regional Office, but such a system would raise some serious legal problems unless the the Regional decision conformed to a traditional adjudicatory hearing and produced a full record and transcript. I know that the Veterans Administration is opposed to formalizing its processes along judicial models, so I don't see that suggestion as being realistic. An alternative might be to reduce the de novo characteristics of BVA hearings and appeals and charge the BVA with the responsibility of ensuring that regional decisions were consistent and supported by the record. This might reduce the workload and appeal time, yet avoid regional inconsistencies.

3. You have stated in your testimony that you have many examples of situations in which the VA has acted arbitrarily and capriciously. Please supply the Committee with examples of the cases to which you have referred.

Ans: Enclosed please find excerpts from the text, footnotes, and exhibits of my Report to the Administrative Conference of the United States compiling a number of reported illustrations of arbitrary, capricious, or irregular action of the Veterans Administration. I have also received any number of letters from veterans around the country who have reported what they consider to be illegal actions of the Veterans Administration. All of these persons ask, however, that their identities not be revealed, so there is not much point in recounting them as there is no reliable means for corroboration. One story, however, which I tend to find believable, states that the veteran reported that he has sustained an injury to his back "when lifting." He reports that this was transcribed to the effect that he had hurt his back "when enlisting," and that he was turned down consistently by the VA on the ground that since the injury had been sustained "when enlisting" is could not be service-connected.

All best wishes, and if there is any way in which I can be of further assistance, please let me know.

Sincerely yours,

Frederick Davis
Dean

NOTE: The above-mentioned excerpts from the report of Dean Davis to the Administrative Conference of the United States are retained in Committee files.

Jewish War Veterans of the United States of America
1712 New Hampshire Avenue, N.W., Washington, D.C. 20009

Stanley N. Zwaik
NATIONAL COMMANDER

0783146NX

July 19, 1983

The Honorable G.V. Mongomery
Chairman, Subcommittee on
Oversight & Investigations
House Committee on Veterans' Affairs
335 Cannon House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I regret that we will be unable to testify before your Subcommittee July 21st regarding legislation providing for judicial review of determinations made on veterans' claims by the Veterans Administration. However, I would appreciate this letter being entered into the formal hearing record.

As we indicated both in a resolution passed at our National Convention last year and reiterated in testimony before your committee March 17th, JWV stands forthrightly in support of legislation to subject Veterans Administration decisions on benefits to review by the courts.

Currently, veterans' constitutional rights are limited through the denial of a veteran's right to appeal unfavorable decisions on benefits. In addition, the arbitrarily fixed ten-dollar maximum lawyer's fee violates a veteran's right to legal representation. It is inequitable to limit veterans' constitutional rights to appeal, and to limit their legal representation while these rights are secured for people who face civil or criminal charges.

We urge the passage of pending legislation which would make the VA subject to the same judicial review provision to which the Social Security Administration and other agencies are subject. The legislation also provides for the deletion of limits on legal fees and requirements for the VA to publish proposed rules and regulations for public comment.

We believe it is essential for American veterans to receive the same constitutional rights granted to all other U.S. citizens. It is time for Congress to pass this long overdue piece of legislation, which constitutes a great step forward in promoting the rights of veterans.

Sincerely,

Stanley Zwaik
National Commander

NATIONAL ASSOCIATION
OF ATOMIC VETERANS
WASHINGTON OFFICE • SUITE 606, 236 MASSACHUSETTS AVENUE, N.E., WASHINGTON, D.C. 20002 • (202) 543-7711

TESTIMONY OF E. COOPER BROWN, GENERAL COUNSEL
FOR THE NATIONAL ASSOCIATION OF ATOMIC VETERANS

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION
BEFORE THE HOUSE VETERANS AFFAIRS COMMITTEE

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE

Thank you for the opportunity to present the view of the National Association of Atomic Veterans on whether there should be judicial review of Veterans Administration (VA) decisions on veterans' claims for benefits and services.

The National Association of Atomic Veterans is a proponent of judicial review. NAAV's position reflects the views of its veteran membership.

NAAV was founded in February 1979 by Wanda Kelly and her husband Orville Kelly to help Atomic Veterans and their families gain medical treatment and service connected Veterans Administration benefits for their radiation-caused illnesses.

Begun with 150 Atomic Veterans and their families, NAAV has grown to a national organization with over 10,000 persons on their mailing list. NAAV is a non-profit organization whose mandate is:

- to identify up to 250,000 military men exposed to ionizing radiation;
- to assist Atomic Veterans in gaining medical coverage from the Veterans Administration and to file for service connected disability;

- to gain Congressional recognition for Atomic Veterans as radiation victims, and to amend laws to aid them in gaining medical treatment and service connected benefits.

Veterans of nuclear weapons testing have been left with no legal recourse for relief. Many of the Atomic Veterans have sought care and compensation from the Veterans Administration. Some have gone to court seeking damages from the government. Neither course has yielded relief.

First, the Veterans Administration does not recognize the relationship between exposure to ionizing radiation and radiation-induced chronic diseases. Moreover, there is no absolute scientific consensus as to the relationship between the level of radiation exposure and subsequent health problems.

Second, a veteran filing a claim against the V.A. is limited by law to paying a lawyer a maximum of $10.00 (ten dollars) to represent him. To protect veterans from being preyed upon by lawyers a law was enacted after the Civil War limiting the fee a lawyer may accept to $10.00 for representing a veteran before the V.A.

Third, the V.A. is virtually unique among federal agencies in that its decisions are not subject to judicial review. Consequently, a number of Atomic Veterans have sought to sue the government directly for damages through the courts. Their way has been blocked by a legal doctrine that exempts the military from liability for injuries to service men that occur in the course of their services -- the *Feres* doctrine.

For the Atomic Veteran, *Feres* has meant the dismissal of claims of in-service negligence as well as those alleging violation of constitutional rights. (See, e.g. Jaffee v United States, 592 F.2d 712 and 663 F.2d 1226 (3rd Cir., 1981); Broudy v United States 661 F.2d 125 (9th Cir., 1981); Laswell v Brown, 683 F.2d 261 (8th Cir., 1982). In consistently barring these suits for service-related injuries, the courts have also frequently questioned its wisdom and expressed dismay at the harsh results it so often yields in the particular case. For example, Judge Stern, of the U.S. District Court in New Jsersey, in dismissing the Jaffee complaint, closed his opinion by quoting an exchange which had occurred during the oral argument of the case -- an exchange which the judge felt served to sum up "this unjust application of the Feres rule":

Judge Stern: "As I read the law, it doesn't matter if they stood there and said, "one, two, three, left, right, left,' and marched them over a cliff... You'd be protected by Feres?"

Government attorney: "Yes your Honor."

The interest of the National Association of Atomic Veterans in judicial review is twofold in nature. The NAAV feels the process by which the Atomic Veterans were denied VA benefits has had a negative impact on the agency's image. It can be argued that there has not been enough medical research to support the case of the Atomic Veterans. Nevertheless, it is also clear that there is not enough medical research to substatiate the final conclusions by the V.A. What is needed is a fair, judicious, judicial review of cases by an impartial third source.

Moreover, the impact of a judicial review would be to affirm the faith of American veterans in the U.S. government.

JUDICIAL REVIEW

In the past, some people have begun the discussion about judicial review by asking "what is so wrong with the VA and the BVA that judicial review is needed?" NAAV submits to you that this is not the correct question. The United States has a Supreme Court which is a cornerstone of our democratic and constitutional society. There is also a multitude of other courts and tribunals where decisions are subject to review by the Supreme Court. However, as we all are well aware, the existence of a Supreme Court does not imply the inadequacy, arbitrariness, or wrongness of the lower courts. Nor does the existence of the judicial system imply the wrongness or illegality of the other branches. The existence of the courts and legal system of which they are a part is merely the way in which disputes are resolved in our society.

NAAV's point, very simply, is that one need not point to errors, inadequacies, or other problems at the VA to argue for judicial review. The American system of government uses the judicial system to resolve disputes. Premising the argument about judicial review on debates about VA problems or errors leads to a very serious confusion of the real issues. Tying the debate about judicial review to a discussion of VA flaws leads to the serious problem of denominating people who favor judicial review as critics or even opponents of the agency. In reaction to this first mistake, people who want to support the agency, in response to the preceived attack, automatically become opponents of judicial review. Thus, people who want to be "friends" of the agency believe they are obligated to oppose judicial review. Unfortunately and intentionally, these people become the worst enemies of the agency they are trying to protect. This happens because their efforts to prevent judicial scrutingy lead to the belief in the minds of the general public that there must be something the agency is trying to hide. Many veterans unfortunately believe that there must be something wrong with the VA because people have fought to prevent court review. This chain of reasoning is wrong at every step because it starts with a false premise and continues to build on it.

Unfortunately the prohibition against judicial review has led to a special status for the VA in the minds of veterans and the public. The product of the prohibition against judicial review is mistrust, suspicion and lack of confidence. The VA has been perceived as an agency beleaguered by criticism in the press and the media. Review by the courts would provide an explanation of decisionmaking and a ventilation of the frustrations of veterans. There can be no doubt that the prohibition aginst judicial review has had a negative impact on the image of the agency. Because the agency will necessarily deny the claims of some veterans, it is necessary to provide the opportunity for release of frustration that judicial review provides.

It is our contention that equating "friend" of the V.A. to opponent of judicial review, and proponent of judicial review to "enemy" of the VA is ill-advised, confused, and in the simplest of terms - wrong. The legal system is based on the idea that there are different viewpoints and ideas.

Those of us who are lawyers know that as long as there are two lawyers there will be two different points of view. Judges and courts reverse themselves. The law is a fluid process of everchanging ideas, not an inflexible system where right and wrong reamin the same. The endless changes in the law reflects the changes in life itself and the variety of opinions that each human being has. Those of us who believe in a democratic and free society would want it no other way.

Judicial review results in wider participation by skilled advocates raising different points of view. Judicial review represents participation, diversity and opennes.. This concept that review is based on differing opinions rather than negative criticism is clearly recognized by the VA system itself. The agency has liberal administrative appeal rights and opportunities for re-considerations. It also has a variety of review processes that can take place by Central Office staff before the case goes to the BVA. VA Manual M21-1, in the chapter on administrative reviw, sets out these processes and allows in section .02 for advisory opinions and in section .06 for situations of differences of opinion. The VA administrative process is predicated on the acknowledgement that disagreements and changes of position are possible without anything being wrong with the system or the people in it. Judicial review is consistent with the VA system and its operations and one need not criticize, oppose, or change the VA for it to take place.

Another argument against judicial review by those who continue to argue for the perpetuation of a system which gives veterans fewer rights than other citizens is the suggestion that judicial review will cause some great harm. This harm is however, never made specific. We have heard that it could cause the loss of informality at the VA that allegedly benefits the veteran. One need not resort to theory, legal or otherwise, to undercut this argument. We have participated in administrative hearings before numerous administrative bodies. All of these bodies have their decisions reviewed by courts. The proceedings are in no way more formal or adversarial than those of the BVA.

The Ten Dollar Fee Limination

Apart from the merits of judicial review of VA decisions, NAAV urges the Committee to take action to eliminate the ten dollar fee limitation. The limitation deprives veterans of a basic right that all citizens have, to seek professional assistance to help them sort through a complicated legal system. They should have the opportunity to go into the marketplace and pay for the legal services they need, without the statutory barrier that lingers from another historical era and set of circumstances. There can be no doubt that the ten dollar fee limitation acts as an almost complete exclusion of lawyers. It is a perfect example of inappropriate and unncecessary government regulation to deny citizens a free choice in the market place. Because of this indisputable effect, the fee limitation must be viewed for what it is: a prohibition against veterans securing legal representation.

Some believe that removal of the fee limitation and introducing lawyers into the VA system would harm that agency's decisionmaking process. Arguments against such representation suggest that lawyers would unnecessarily complicate the process, create an adversary relationship between veterans and the VA, and that simply suggesting the notion of lawyer representation before the VA is an indictment of current adjudication.system. Rather, the right to seek legal assistance should stand alone as an option for all veterans.

The most important function lawyers can serve at the VA, as they have at other federal agencies, is that of mediator between the veterans and the agency. The typical lawyer who advocates before an administrative agency does not fit the stereotypical image of adversarial trial-type litigator, the image created by some who oppose lawyer participation at the VA. Persons familiar with federal agency practice know that the role of an administrative advocate is far different from a courtroom litigator. The administrative lawyer frequently acts to explain a complex agency to a client, attempts to clarify issues for both the client and the agency, and endeavors to resolve claims with as little acrimony as possible

The lawyer's task of clarifying issues should be viewed as one of the most important and most promising results which would accrue to the VA. In scores of cases presented to the BVA, especially in situations involving Atomic Veterans, the veteran either had not raised the proper issues or he/she raised the correct issue but in a way that did not clarify the argument.

In these cases, an attorney would have been able to frame the issues carefully an succinctly to the VA.

An even more pressing point against the argument that lawyers will somehow infect they system is to look at the VA itself. The BVA has fifteen sections each with three members. Fourteen of the fifteen sections have two attorneys on the three-member panels. In the fifteenth section all three members are lawyers. In addition, each section has seven or eight staff attorneys. In short, the entire decisionmaking process is monopolized by attorneys. Everything is done in legalistic terms. To argue that allowing the veteran to have a lawyer will infect the process with legalism ignores the reality of the process as it now exists. To send a person into a decisionmaking processes that is so totally dominated by lawyers and to deny that person access to a lawyer is the consummate injustice. Recognizing the situation for what it is can only lead to the question of how this injustice has been allowed to continue.

Lawyers have been trained to approach issues in a certain manner, a manner that is used to adjudicate issues by all federal agencies as well as courts. To permit veterans to have paid legal representation would simply allow them to hire a professional to present their case in a way best understood by the decisionmakers. Given the incredible caseload of the BVA, the clarifications of issues that a legal advocate can perform will assist the BVA and at the same time give the veteran informed access to the system.

We also strongly believe that veterans with professional legal representation are better informed citizens who will be more satisfied with the VA system once their case has been decided. NAAV has witnessed a definite sense of satisfaction among Atomic Veterans who know that their case has been fully explored and presented carefully before the BVA. Even those clients who lose after all this work feel that justice has been done. It is this sense of basic fairness that is the intangible benefit of judicial review and legal representation. and which may be the most significant result. The ventilation provided by lawyer participation and judicial review will also raise public opinion about the VA. The prohibition of judicial review and attorney representation has caused many of the problems of the agency's image because there is no release for frustrations. There can be no doubt that eliminating these barriers will provide a great boost to the agency's public image and self-esteem.

LAW OFFICES
POWER, BOWEN & VALIMONT
102 N. MAIN STREET
P. O. BOX 818
DOYLESTOWN, PA 18901-0818
TELEPHONE 345-7500
AREA CODE 215

WEBSTER S. ACHEY (1918-1953)
JAMES C. BOWEN
ROBERT W. VALIMONT
WILLIAM B. MOYER
SAMUEL G. MOYER
JOHN D. TRAINER
WILLIAM E. BENNER
GORDON G. ERDENBERGER
ROBERT A. NARAGON
JOHN J. HART
WILLIAM T. RENZ
THOMAS L. SUMTER
MICHAEL S. VALIMONT
ANITA F. ALBERTS
WILLIAM H. FUSS
HERBERT K. SUDFELD, JR.

COUNSEL
WILLIAM M. POWER

64 N. MAIN STREET
P. O. BOX 580
SELLERSVILLE, PA. 18960-0580
TELEPHONE 257-3881

STATEMENT OF ROBERT W. VALIMONT ON BEHALF OF HIMSELF AND THE DEPARTMENT OF PENNSYLVANIA, THE AMERICAN LEGION BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS COMMITTEE ON VETERANS AFFAIRS HOUSE OF REPRESENTATIVES JUDICIAL REVIEW

Mr. Chairman and Members of the Subcommittee:

I am a retired Brigadier General in the United States Air Force Reserve and a veteran of World War II and the Korean War serving in the grades of Private through Brigadier General with seven years of active service and some 26+ years of active Reserve Service. I have been very active in matters of veterans affairs and have served as Judge Advocate of The American Legion, Department of Pennsylvania, for 18 consecutive years. This statement is being furnished to you on behalf of myself in my individual capacity as a veteran, a lawyer, a citizen, and also on behalf of the Department of Pennsylvania, American Legion. It is with some reticence that this statement is being made to you because the position of myself and the Department of Pennsylvania is not in accord with the national Legion policy adopted at the last Legion Convention on Judicial Review.

We in Pennsylvania respect the position that was adopted at the National Convention but we also strongly believe that the time for Judicial Review for veterans has come. We further believe that the concern expressed in the Ohio resolution No. 141 of the past Convention of the American Legion has been met and that proposed legislation in our opinion fully meets all of the concerns addressed by the said resolution and by members of the American Legion who may have a different view.

It is also understood that the matter of Judicial Review continues to be considered by the national organization and that it is expected that it will again be considered at the National Convention in Seattle in August of 1983.

With this in mind, the matter was again considered by the Department of Pennsylvania at its annual convention held in Pittsburgh this month. Pennsylvania, as you may know, has the largest membership of any Department in the entire American Legion. Its members total approximately 250,000 and constitute approximately 10% of the entire Legion membership. The Pennsylvania membership at its convention in July of this year unanimously adopted a resolution in support of Judicial Review. A copy of that resolution is appended hereto.

In support of the position adopted by the American Legion Department of Pennsylvania, I would like to comment on the objections that were raised in the Ohio resolution and point out as to how we feel that proposed legislation would meet these objections. The objections raised in the Ohio resolution were that:

1. The system of Judicial Review would create an adversary relationship with the government and would require the claimant to adhere to the rules of evidence in support of the claim which

is not presently the case within the VA adjudication system.

2. Under the doctrine of res judicata a court decision would preclude the reopening of a claim on the veteran's part as contrasted by existing VA rules and practices which permit almost unlimited reconsiderations, and

3. The prospect of the claimant paying to obtain benefits is in contravention to the American Legion philosophy.

In answer to these contentions, the legislation as passed by the Senate would codify certain adjudication procedures provided by existing VA regulations and would be intended to insure that the VA's present practices of making every reasonable effort to assist a claimant and in construing the evidence favorably to the claimant are not abandoned in response to the providing for Judicial Review. There is no reason to believe that this would in any way place the veteran in an adversary relationship with the government. The existing system would remain the same through the Veterans Administration and the right to appeal would be only for those whose claims have been finally denied by the Veterans Administration. The fear that a veteran will receive better treatment by the VA and better consideration by the VA when there is no right to appeal is hard to understand. It would seem that it could arise only if the VA would be practicing retribution because of the veteran being given a right that basically all other persons now have, namely access to the courts. We in Pennsylvania do not believe that the Veterans Administration would ever stoop to such a practice. Inasmuch as it is only in the case of an adverse decision by the VA against the veteran that there would be an appeal, it is hard to conceive how the veteran would be hurt by being given a right to appeal from something which had already been decided against him. The Veterans Administration in hearings before the Senate last year in the case of Senate Bill 349 estimated that 10% greater benefits would result.

Proposed legislation would provide that presentation before the Veterans Administration would remain the same and therefore no strict rules of evidence would apply. There is no new hearing on appeal and existing liberality in presenting the claim before the Veterans Administration would apply.

The fear expressed that a court decision would preclude a reopining of a claim on the veteran's part as contrasted by existing rules and practices which permit reconsiderations has been amply taken care of by proposed legislation. For example, Senate Bill 636 specifically provides that the right to Judicial Review shall in no way diminish the right of the Board of Veteran's Appeals to authorize the reopening of a claim and a review of the former decision. Clearly the doctrine of res judicata does not apply under proposed legislation.

The very stringent limitations on payments of attorney's fees as embodied in S 636, we believe, is not abhorrent to any philosophy that can be maintained by veterans. No fee would be payable in excess of $10.00 for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered. Only after such time that the veteran has already had a decision rendered against him by the Administrator would there come into play any fee and the Administrator would be required to approve the fees within the constraints set forth in the legislation. In the case of fees where Judicial Review is accorded, the court is permitted to determine and allow a reasonable fee for the representation by the attorney in carrying out Judicial Review. It must be borne in mind that for such an award to be made, the veteran must have had his case finally decided against him at the Veterans Administration level and then in the case of a favorable determination, the fee may not exceed 25% of the total amount of past due benefits awarded. It is difficult to comprehend how a veteran is financially harmed in such a case where the veteran is guaranteed at least 75% of benefits that the veteran had already been totally deprived of except for the successful appeal. The limitation of $750 as a fee that might be allowed in the event of the loss of the case in the event of Judicial Review and the limitation of 25% in the case of a successful Judicial Review will certainly prevent frivolous cases being taken by any attorney. These provisions, however, may accord a veteran representation that the veteran would not otherwise be able to attain.

In summary, to deny a veteran Judicial Review in our opinion cannot be justified on any rational basis. We believe that the according of this right of Judicial Review will not result in the Veterans Administration unfairly administering the law just because it is subject to Judicial Review. We likewise have confidence in our court system so that in reviewing the decisions of the Veterans Administration even handed justice will be attained. It must also be remembered in this respect that only those matters already decided adversely by the Veterans Administration to the claim of the veteran will be before the court on review. The interest of the veteran in any court action can only be enhanced by the court review and not harmed as the veteran has already lost at that level.

In this statement, I have not commented upon the technical aspects of Judicial Review but mostly the philosophy and how we feel that the proposed legislation meets the objections that have previously been raised by the American Legion. I personally feel that the "arbitrary, capricious, and abuse of discretion" test as opposed to the "substantial evidence" standard imposes on the veteran on matters on appeal a burden greater than that imposed ordinarily in the matters of Judicial Review for other citizens. Accordingly, I would recommend that consideration be given to the provision for a "substantial evidence" standard in your consideration of the legislation.

We wish to thank the Subcommittee for receiving this statement.

ENCLOSURE: Pennsylvania Resolution 65-24 adopted at Department Convention July 14-16, 1983.

Pa. Res 65-24

RESOLUTION

WHEREAS, under interpretation of existing law, there is no redress of claims by any veteran in the Courts of the United States; and

WHEREAS, existing law does not afford any veteran judicial review from a decision of the Veterans Administration denying benefits to any veteran; and

WHEREAS, it is deemed that the view that veteran's benefits are mere gratuities and that veterans have no interest in or right to such benefits is not a tenable position; and

WHEREAS, justice and equity demand that veterans be served with compassion, fairness and efficiency and that every veteran is entitled to receive from his government every benefit and service to which he or she may be entitled under law; and

WHEREAS, the United States Senate has passed and sent to the House a bill in the form of Senate Bill 636 by amending and adding the same to House Bill 2936 which would provide limited judicial review for those veterans aggrieved by an adverse decision of the Veterans Administration; and

WHEREAS, similar legislation is presently pending in the House of Representatives and hearings on the same are scheduled for the month of July of 1983; and

WHEREAS, it is deemed that the scope of review as embodied in S-636 will go a long way toward bringing about fundimental fairness to veteran claimants in providing limited access to Courts for judicial review and said bill fairly meets any objections expressed against the according of such rights.

NOW, THEREFORE, BE IT RESOLVED by the American Legion, Department of Pennsylvania, in Convention assembled in Pittsburgh, Pennsylvania on July 14-16, 1983, That:

FIRST: The American Legion, Department of Pennsylvania, petition the Congress of the United States to provide for judicial review from decisions of the Veterans Administration adverse to claims of such veteran and that the American Legion, Department of Pennsylvania, support the enactment of legislation as embodied in S-636 and as reported to the United States Senate in Report No. 98-130 and that the Department Judge Advocate be authorized to convey the views of the Department of Pennsylvania to the House Veteran's Affairs Committee.

SECOND: The American Legion, Department of Pennsylvania, recommend to the National organization for adoption at the National Convention a like resolution.

Provisions of H.R. 2936, As Amended, Relating to Payment of Attorneys' Fees

On June 15, 1983, the Senate passed S. 636 to provide judicial review of veterans claims and to revise attorneys' fees. S. 636 was laid upon the table, and the Senate then took up H.R. 2936, struck everything after the enacting clause, and substituted the text of S. 636. H.R. 2936, as amended, was passed by the Senate and returned to the House on June 15.

Title IV of H.R. 2936, as amended, would revise the present title 38 limitation of $10 for claimants' attorneys' fees by authorizing reasonable attorneys' fees, within certain limits, for representation of individuals before the VA and for representation in a case appealed to court under the judicial review provisions added to title 38 by this title of the Committee bill, with a specified limitation in cases in which the matter is resolved in a manner unfavorable to the claimant. Included in title IV are provisions that would:

1. Retain the $10 limitation on the amount an attorney may receive for services rendered prior to a final BVA decision, while removing an ambiguity with respect to whether that limitation applies under current law to attorneys "recognized" for practice before the VA.

2. Permit the Administrator to approve a reasonable attorneys' fee for representation within the VA after a final BVA decision (where, for example, a case remains before the VA for reconsideration or for reopening on the basis of "new and material evidence" offered under section 4004(b) of title 38, United States Code, as amended by title I of the Committee bill), up to a maximum of $500 or, if the claimant and attorney have entered into a contingency-fee agreement, no more than 25 percent of any past-due benefits awarded the claimant.

3. Authorize the Administrator to increase the $500 maximum limitation in future years to reflect changed economic conditions.

4. Authorize the Administrator to disregard the $500 limitation in an individual case involving extraordinary circumstances warranting a higher fee.

5. Allow a reviewing court, in a case appealed from the VA, to approve a reasonable attorneys' fee. For cases not resolved in a manner favorable to a claimant, the maximum a court could approve would be $750. For cases resolved in a manner favorable to a claimant, the only limitation on the amount of the fee that a court could approve would be that it must be reasonable, or that, if a claimant and an attorney had entered into a contingent-fee agreement, the fee approved by the court could not exceed 25 percent of the total amount of the past-due benefits.

6. Authorize the VA to make payment to an attorney from past-due benefits, but preclude the VA from making payments from benefits received subsequent to the date of the decision entitling the veteran to benefits.

7. Limit the applicability of the attorneys' fee provisions to cases involving claims for benefits.

8. Define, for the purpose of attorneys' fees provisions, a claim as being "resolved in a manner favorable to the claimant" when any or all of the relief sought is granted.

9. Authorize a court to award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of the Equal Access to Justice Act under which such an award may be made unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

10. Provide criminal penalties for willfully and intentionally defrauding a VA claimant.

July 1, 1983

Honorable John A. Svahn
Commissioner, Social
  Security Administration
6401 Security Boulevard
Baltimore, MD   21235

Dear Mr. Commissioner:

The Subcommittee on Oversight and Investigations is currently studying the issue of judicial review of veterans' claims. As you may know, legislation allowing judicial review has been reported by the Senate for the last few years; however, the House Committee has never favorably considered such legislation. The Subcommittee is now in the process of gathering information on the potential effects that passage of this type of legislation might have on the VA system as well as on the Federal Court system.

Although we realize that the processing of Social Security disability claims and the processing of veterans claims may be somewhat different, we are interested in what effects judicial review has had on the Social Security Administration. It would be helpful to us to have information concerning the appeals process used by the SSA, as well as annual statistics on the number and disposition of cases which are considered at each level of the process, including the Federal Court level. Any other materials you believe might be useful will also be appreciated.

If you have any questions, please contact Beatrice Eld of the Subcommittee staff at 225-3541.

Your cooperation in providing a prompt response to this request will be appreciated.

Sincerely,

G. V. (SONNY) MONTGOMERY
Chairman

DEPARTMENT OF HEALTH & HUMAN SERVICES Social Security Administration

Refer to: SRP Baltimore MD 21235

SEP 28 1983

SEP 28 1983

Honorable G.V. (Sonny) Montgomery
Chairman, Committee on Veterans' Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of July 1 to former Commissioner Svahn requesting information concerning the appeals process used by the Social Security Administration (SSA). Please accept my apology for the delay in responding.

I have enclosed some materials which describe the appeals process for claimants seeking benefits under the Social Security Act and statistics on the volume and disposition of cases considered at each level of the process. As you can see, the Office of Hearings and Appeals (OHA), which has responsibility for administering the major portion of SSA's appeals process, is faced with a dramatically increasing adjudicative workload, particularly in new court actions. During Fiscal Year 1982, OHA's court actions increased by 33 percent over Fiscal Year 1981 from 9,055 to 12,045. Based on current data, it appears that in Fiscal Year 1983 over 20,000 new civil actions will be filed. The great majority of these cases involve claims for Social Security disability benefits.

This increased workload is severely taxing the resources of OHA. The cost to the agency for providing a hearing before an Administrative Law Judge (ALJ) is approximately $556 per case. A request for review by the Appeals Council adds a further cost to the agency of approximately $230 per case. The total cost of processing a case that is remanded to the Appeals Council from a Federal Court is approximately $1,818.

During last fiscal year, ALJ dispositions adverse to claimants totaled 140,199 cases. During this same time, approximately 10 percent of all unfavorable actions by ALJ's resulted in civil actions. To put this in further perspective, out of 140,199 unfavorable dispositions made by ALJ's during Fiscal Year 1982 less than 1 percent, 1,145, were overturned by district courts.

It is difficult to say with certainty to what extent judicial review has been detrimental to SSA's administration of the Social Security program. However, it is clear that court actions in Social Security cases have caused the Congress and SSA concern at various times. It was because of this concern that the Congress included in the Social Security Amendments of 1967 a provision designed to tighten the definition of disability for purposes of determining eligibility for Social Security benefits. In its report on the

1967 amendments the Committee on Ways and Means pointed out that such a provision was necessary because the previous definition of disability had become eroded over time, at least partially because of "a growing body of court interpretations of the statute which, if followed in the administration of the disability provisions, could result in substantial further increase in costs in the future." More recently, there have been instances in which circuit courts throughout the country have rendered different, and often conflicting, opinions on the same subject, thus severely hampering SSA's ability to uniformly administer a national program.

I hope this information is helpful to your Committee. Please let me know, if we can provide you with any further information concerning the appeals process within SSA.

Sincerely,

John Trout
Director, Office of Legislative
and Regulatory Policy

Enclosures

TAB A

Chapter 20

Determinations and Appeals

2000. Appeals process, general.
2001. Time limits for requesting review.
    2002. Initial determination defined.
    2003. Actions which are not initial determinations.
2004. Reconsideration.
    2005. Reconsideration process.
2006. Hearing by administrative law judge.
    2007. How administrative law judge may dispose of case.
    2008. Notice of time and place of hearing.
    2009. Assistance of Social Security office available.
    2010. Administrative law judges' decisions.
2011. Review by the Appeals Council.
    2012. Procedure.
2013. Extension of time for filing request for reconsideration, hearing, or review.
2014. Time limit for reopening final determinations.
2015. Representation of claimant.
2016. Fees that may be charged by claimant's representative.

2000. THERE IS A SPECIFIC APPEALS PROCESS before the Social Security Administration to be followed by a claimant, or a claimant's appointed representative if there is disagreement with a decision concerning a claim for benefits.

- First, the claimant or representative must request that the *initial determination* (decision) be reconsidered. A *reconsideration* is a reexamination of the administrative records.
- If there is still disagreement with the reconsidered determination, the claimant or representative may request a *hearing* before an administrative law judge.
- If the person disagrees with the administrative law judge's decision, he or she may request *a review of the decision by the Appeals Council* of the Office of Hearings and Appeals, which has the discretion to deny or grant a review. Also, the Appeals Council may, on its own initiative, review an administrative law judge's decision.
- After Appeals Council review (or denial of review) a person who is still dissatisfied may file a *civil action* in the U.S. District Court, asking for a review of the final administrative (i.e., Appeals Council) decision.

This chapter provides a general description of these various independent reviews of a case provided for in the appeals process, and explains the rules for reopening determinations and decisions. There are exceptions to these rules under certain circumstances. Where the exceptions apply, individuals are made aware of them along with a decision or determination.

2001. THERE ARE SPECIFIED TIME LIMITS for requesting each review in the administrative appeals process. If the claimant or the claimant's representative does not request the next step within the prescribed time limit (unless a longer period is allowed for good cause), the determination or decision becomes final and binding on the parties affected, except as provided in § 2014.

If the time limit for requesting review ends on a Saturday, Sunday, legal holiday, or Federal nonwork day (by statute or Executive Order), the time limit is extended to the next following work day.

A. An *initial determination* becomes final unless reconsideration is requested within 60 days from the date notice of the initial determination is received by the claimant or the claimant's representative. (See § 2004.)

B. A *reconsidered determination* becomes final unless a hearing is requested within 60 days from the date notice of the reconsidered determination is received by the claimant or the claimant's representative. (See § 2006.)

C. A *decision of the administrative law judge* becomes final unless review of the decision by the Appeals Council is requested within 60 days from the date notice of the administrative law judge's decision is received by the claimant or the claimant's representative, or unless it is reviewed by the Appeals Council on its own motion. (See § 2011.)

D. A person may obtain a court review of a denial of a request for Appeals Council review or of a final decision of the Appeals Council by filing a civil action within 60 days from the date notice of the denial or the decision is received by the claimant or the claimant's representative. The U.S District Court generally has no jurisdiction until the Appeals Council has made its decision or denied the request for review. (See § 2012.)

If a civil action is filed, a United States District Court will review the Social Security Administration's decision, and the decision of the court, if not appealed, will be final. If the District Court's decision is appealed, it is subject to further review and affirmance, modification, or reversal by a Court of Appeals or the Supreme Court. (See § 2013 concerning granting of extension of time in filing appeals.)

2002. AN INITIAL DETERMINATION is a formal decision affecting monthly benefits, the lump-sum death payment, a period of disability, a Social Security earnings record, or entitlement to hospital insurance or medical insurance. Such decisions include:

A. Awards of monthly benefits or the lump-sum death payment.
B. Recomputation of monthly benefits.
C. Disallowance of benefit claims.
D. Denials or approvals of applications to establish a period of disability.
E. Determinations on deductions from benefits.
F. Determinations with respect to the termination of benefits or a period of disability.
G. Determinations with respect to continuing entitlement to, or reinstatement of, benefits.
H. Determinations as to whether benefits should be paid to another on behalf of the person entitled to them.
I. Adjustment or recovery of overpaid or underpaid amounts.
J. Revisions of Social Security earnings records.
K. Determinations as to support by the worker of a parent.
L. Determinations about entitlement to hospital insurance.
M. Determinations about entitlement to medical insurance.
N. Determinations regarding disability and the amount of supplemental security income payments.
O. Determinations with respect to what constitutes income and resources in deciding the amount of supplemental security income payments.

Written notice of a determination will be mailed to the applicant or other party concerned. This notice may be an award certificate, a disallowance letter, or a letter explaining the decision.

2003. ADMINISTRATIVE ACTIONS WHICH ARE NOT INITIAL DETERMINATIONS are not subject to appeal but may receive administrative review. Such actions include:

A. Joint payment of total benefits to two or more individuals in the same family.
B. Withholding of part of a monthly benefit to recover an overpayment.
C. Authorization approving the amount of fee that may be charged or received by a representative for services before the Social Security Administration.
D. A presumptive finding of disability and eligibility for presumptive disability payments in the supplemental security income program.

2004. **RECONSIDERATION OF AN INITIAL DETERMINATION** may be requested by the claimant, by another person whose benefit rights are harmed by the determination, or by the appointed representative of either. Also, an initial determination may be reexamined by the Social Security Administration on its own initiative, as indicated in § 2014. The reconsideration must be requested in writing by the person (or the person's representative) within 60 days from the date notice of the initial determination is received. Date of receipt of the notice is presumed to be the fifth day following the date of mailing of the notice of initial determination unless it can be shown the notice was received later or not at all. The request can be made on a special form available at any Social Security office or by letter.

2005. **THE RECONSIDERATION PROCESS IS A THOROUGH AND INDEPENDENT REVIEW OF THE CASE.** It is based on the evidence submitted for the initial determination plus any further evidence that the claimant may submit in connection with the reconsideration. A reconsideration is made by a member of a different staff from the one that made the initial determination and who is specially trained in the handling of reconsiderations. (See § 124.)

2006. **A HEARING** by an administrative law judge may be requested by a claimant or appointed representative who disagrees with the reconsidered determination or by a person who can show that the reconsidered determination will harm the person's rights under the Social Security Act. The hearing is conducted by an administrative law judge of the Office of Hearings and Appeals.

A request for a hearing should be made in writing within 60 days from the date notice of the reconsidered determination is received. Date of receipt of the notice is presumed to be the fifth day following the date of mailing of the notice of reconsidered determination unless it can be shown the notice was received later or not at all. The request can be made on a special form available at any Social Security office or by letter and should be filed with that office, with an administrative law judge, or with the Appeals Council. The hearing is a thorough review of the record. The claimant or the claimant's representative may appear in person.

The decision of the administrative law judge is made on the basis of the evidence already submitted, any additional evidence the claimant presents, evidence that is otherwise submitted, and any testimony given at the hearing.

2007. THE ADMINISTRATIVE LAW JUDGE MAY:

- A. Dismiss the case if:
    1. The claimant requests it; or
    2. The claimant does not appear at a scheduled hearing, or dies; or
    3. The request was not filed within the time limit; or
    4. The person was not a party to the reconsideration; or
    5. There has been a previous determination or decision as to the rights of the claimant on the same facts and issues now present, which has become final; or
- B. Hold a hearing on the case and issue a decision.

2008. NOTICE OF THE TIME AND PLACE OF THE HEARING is sent by the administrative law judge to the parties to the hearing at least 10 days before the date set for the hearing, to allow time to prepare for it. The hearing before the administrative law judge usually is held in the area where the person requesting the hearing resides, although the person may be required to travel up to 75 miles. An administrative law judge has authority to issue subpoenas requiring the attendance and testimony of witnesses and the producing of any evidence that relates to the issues involved in the hearing.

There is no provision for holding a hearing outside the U.S. The U.S. is defined as the 50 states, District of Columbia, Puerto Rico, Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. A person outside the U.S. who wishes a review by an administrative law judge may have a review made on the record — with no one appearing in person — or the person may travel to the U.S. at his or her own expense.

2009. THE SOCIAL SECURITY OFFICE IS READY TO HELP the claimant (see § 118) or other interested party to prepare for the hearing by:

- A. Explaining the issues involved in the case.
- B. Explaining how the hearing will be conducted.
- C. Telling the claimant how to arrange for the appearance of witnesses.
- D. Advising the claimant how to obtain any documents that may be needed for the presentation of the case.

A person requesting a hearing may appear personally at the hearing and be represented by an attorney or by any other individual selected by the person; however, it is not necessary that the person be represented, or appear in person. If the claimant or the claimant's representative, or both, do not appear personally, the administrative law judge will make a decision on the basis of the evidence already submitted, any additional evidence presented, and the testimony of any witnesses.

2010. AFTER THE HEARING, THE ADMINISTRATIVE LAW JUDGE WILL USUALLY ISSUE A WRITTEN DECISION affirming, revising, or reversing the reconsidered determination. The administrative law judge may also certify the case with a recommended decision to the Appeals Council for decision (though this would happen very infrequently). All parties to the hearing are notified of the administrative law judge's decision and the reasons for it.

2011. A REVIEW BY THE APPEALS COUNCIL may be requested if a party to the hearing is not satisfied with the action of the administrative law judge whether a decision or dismissal. The Council will grant, deny, or dismiss the request for review as it decides is proper.

A request for a review by the Appeals Council must be in writing and must be filed within 60 days from the date notice of the administrative law judge's action is received by the claimant or the claimant's representative. The request may be filed with any Social Security office, an administrative law judge, or the Appeals Council and may be made either by letter or on a special form available at any Social Security office. (See § 118.)

Within 60 days from the date of the administrative law judge's decision the Appeals Council may on its own motion reopen the claim for review or for the purpose of dismissing the party's request for hearing for any reason for which such request could have been dismissed by the administrative law judge.

2012. THE APPEALS COUNCIL WILL NOTIFY the claimant as to whether or not it will review the case. If the Council decides to review the case, the claimant may request an appearance before the Appeals Council (either personally or through a representative), for the presentation of oral arguments. If the Appeals Council determines that a significant question of law or policy is presented or that oral arguments would be beneficial in rendering a proper decision, the request will be granted. The claimant may also file written briefs in support of his claim. The Appeals Council will notify the claimant of its action in the case.

A claimant dissatisfied with the decision or denial of the request for review by the Appeals Council may bring suit in a U.S. District Court. The civil action in the court must be filed within 60 days from the date notice of the Appeals Council decision or denial of the request for review is received by the claimant or appointed representative. The

Court's jurisdiction is limited to rendering a decision on the record and the Secretary's findings of fact are binding on the Court, if supported by substantial evidence.

2013. AN EXTENSION OF TIME MAY BE GRANTED FOR FILING a request for reconsideration, hearing, or review by the Appeals Council, if the claimant establishes good cause for failing to file the request within the appropriate time limit. The decision as to whether or not to grant the extension is made by the office responsible for making the reconsideration, the administrative law judge, or the Appeals Council, depending upon who has jurisdiction of the case. The Appeals Council may grant an extension of time for filing a civil action in a U.S. District Court, where good cause exists for failure to file within the appropriate time.

2014. EVEN THOUGH A DETERMINATION OR DECISION HAS BECOME FINAL it may be reopened and revised (by the reviewing office, administrative law judge, or Appeals Council) within the time limitations and under the conditions as provided below. The following sections discuss the time limitations on the reopening of determinations or decisions *except those dealing with a Social Security earnings record.*

A determination or decision which has become final (see § 2001) may be reopened and revised:

A. Within 12 months from the date of notice of the initial determination for any reason.

B. After such 12-month period but within 4 years (2 years in the supplemental security income program) from the date of notice of the initial determination, if there is good cause for reopening it. "Good cause" is deemed to exist where:
   1. New and material evidence is furnished after notice to the party to the initial determination is given; or
   2. A clerical error was made in figuring the benefit amount; or
   3. It is clear that, based on the evidence previously submitted, the determination was erroneous.

Note: "Good cause" does not exist where the only basis for reopening the determination or decision is a change of legal interpretation or administrative ruling on which the determination or decision was based.

C. *At any time if:*
   1. The determination or decision was based on fraud or similar fault of the claimant or some other person; or
   2. Someone else makes a conflicting claim on the same Social Security earnings record; or

3. A person believed dead, and on whose Social Security earnings record a person was awarded benefits, is found to be alive; or
4. The death of the individual, on whose earnings record a party's claim was denied for lack of proof of death, is proved by reason of the person's unexplained absence for a period of 7 years or more; or
5. The Railroad Retirement Board has awarded duplicate benefits on the same earnings record; or
6. World War II or post-World War II wage credits were not credited because another Federal agency (other than the Veterans Administration) erroneously certified that it had awarded benefits on the basis of the same military service; or
7. World War II or post-World War II military wage credits had been awarded by Social Security Administration, but notice is later received that a Federal agency (other than the Veterans Administration) has awarded benefits based on the same military service; or
8. The worker's earnings record now shows that a prior disallowance for lack of insured status was incorrect; or
9. The determination or decision is unfavorable to a party thereto and is incorrect because of a clerical error or error on the face of the evidence on which it was based.

Action reopening the determination or decision under either (A) or (B) above must be started within the time limit specified.

The "at any time" rule (C) above in the supplemental security income program only applies if fraud or similar fault is involved.

2015. THE CLAIMANT MAY BE REPRESENTED BY AN ATTORNEY or any other qualified person at any or every step in the proceedings before the Social Security Administration, i.e., initial determination, reconsideration, hearing, and/or Appeals Council review. No person may act as representative of a claimant if that person has been suspended or disqualified by the Social Security Administration from representing Social Security claimants or if he or she is otherwise prohibited by law from acting as a representative .

Only named individuals may act as representatives of claimants. A qualified member in a firm, labor union, or other organization may act as representative of a claimant, but the firm, labor union, etc. will not be recognized as a representative.

To appoint a representative, the claimant must do so in writing over his or her signature, preferably on a special form available at any Social Security office. If the representative is not an attorney, he or she must also accept the appointment in writing, and the appointment and acceptance must be filed with a Social Security office.

2016. THE AMOUNT OF THE FEE THAT AN ATTORNEY OR OTHER PERSON MAY CHARGE THE CLAIMANT for representation in matters before the Social Security Administration must be approved by the Social Security Administration. Upon receipt of a written petition from the representative stating the fee requested and giving a detailed description of each type of service rendered with the amount of time spent on each, as justification for the fee desired, the Social Security Administration will fix the amount of a fee for services. Whether the decision on a claim results in payment to the claimant or not, if a fee is sought, the petition for a fee for services rendered should be submitted as soon as possible after all proceedings are complete. Where an attorney seeks direct payment of the authorized fee from benefits due, a fee petition or notice of intent to submit a fee petition must be filed with the Social Security Administration within 60 days of notification of a favorable decision. Both the claimant and the representative will be notified of the amount authorized and will be given a reasonably complete explanation as to how the Social Security Administration arrived at the authorized fee.

The amount of the fee authorized by the Social Security Administration is determined principally with regard to the nature and extent of the services rendered. However, the Social Security Administration is restricted as to how much of a fee may be paid the attorney directly out of past-due benefits.

When an attorney has rendered services in representing a claimant before the Social Security Administration in a claim for cash benefits and the Social Security Administration has made a favorable decision which resulted in the claimant and the claimant's family becoming entitled to past-due benefits, a part of the past-due benefits may be certified for direct payment to the attorney as compensation for services. Payment to the attorney is limited to whichever of the following is the *smaller:*

A. 25 percent of the claimant's and family's past-due benefits; or
B. The amount which the Social Security Administration has fixed as a reasonable fee; or
C. The amount of fee agreed upon between the claimant and the attorney.

If the total amount of the authorized fee cannot be certified out of past-due benefits, the attorney must look to the claimant and family for the balance.

If a court renders a judgment favorable to a Social Security claimant, the court may allow as part of its judgment a reasonable fee for the attorney representing the claimant in court. The court-allowed fee cannot exceed 25 percent of the claimant's and family's past-due benefit resulting from the favorable judgment. The Social Security Administration may certify the amount of the fee allowed by the court for payment directly to the attorney out of past-due benefits.

The law does not provide for direct payment to representatives for services rendered in connection with a claim for supplemental security income payments. Nevertheless, any fees for services must be approved by the Social Security Administration.

Tab B

Volume and Disposition of Cases at Various Levels of the Appellate Process
Titles II (OASDI) and XVI (SSI)

	FY 1980		FY 1981		FY 1982	
Reconsiderations	592,755		622,800		638,834	
Reversals	77,542	(13%)	74,512	(12%)	71,926	(11%)
Affirmations	515,213	(87%)	548,288	(88%)	666,908	(89%)
Hearings	229,280		259,935		293,031	
Reversals	128,541	(56%)	143,928	(55%)	155,327	(53%)
Affirmations	100,739	(44%)	116,007	(45%)	137,704	(47%)
Appeals Council Reviews	48,717		53,718		63,246	
Reversals	2,363	(5%)	2,571	(5%)	2,777	(4%)
Affirmations[1]	42,551	(87%)	47,095	(88%)	55,665	(88%)
Remands	3,803	(8%)	4,052	(7%)	4,804	(8%)
U.S. District Court Actions	7,715		8,378		9,378	
Reversals	889	(11%)	960	(11%)	1,136	(12%)
Affirmations	3,848	(50%)	4,588	(55%)	4,592	(49%)
Remands[2]	2,970	(39%)	2,830	(34%)	3,650	(39%)
(New Cases Filed)	7,814		9,055		12,045	

[1] Includes those cases which the Appeals Council declined to review.
[2] Approximate.

OHA FACT SHEET

for Fiscal Year 1982

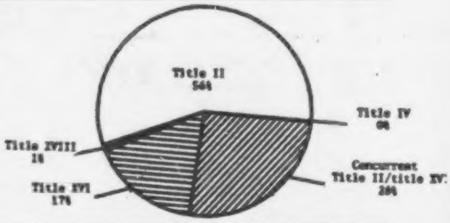
Social Security Administration
Office of Hearings and Appeals
SSA Pub. No. 70-039
March 1983

REQUESTS FOR HEARING

FY 1982

Receipts

	Number	Change from FY 1981
Title II		
DIB	175,789	+ 29%
RSI	5,433	+ 6%
Title XVI	53,112	+ 8%
Concurrent title II/title XVI	82,773	+ 5%
Title XVIII	3,419	+ 16%
Title IV (B.L.)	154	+ 12%
Total	320,680	+ 14%

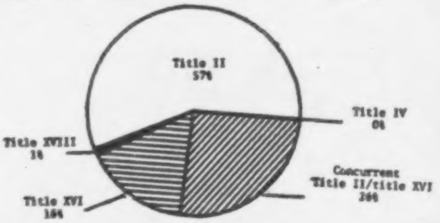


Dispositions

	Dismissed	Denied	Allowed	Total	Change from FY 1981
Title II					
DIB	12,038 (8%)	53,251 (34%)	88,843 (58%)	154,132	+ 22%
RSI	999 (19%)	2,793 (52%)	1,587 (30%)	5,379	+ 8%
Title XVI	7,020 (13%)	21,886 (41%)	24,579 (46%)	53,485	+ 3%
Concurrent title II/title XVI	7,989 (10%)	31,728 (40%)	40,318 (50%)	80,035	+ 10%
Title XVIII	1,064 (32%)	1,318 (39%)	968 (29%)	3,350	+ 33%
Title IV (B.L.)	25 (15%)	88 (53%)	54 (32%)	167	+ 6%
Total	29,135 (10%)	111,064 (37%)	156,349 (53%)	296,548	+ 13%

Pending

	Number	Change from 09/30/81
Title II		
DIB	84,200	+ 35%
RSI	3,019	+ 2%
Title XVI	24,398	+ 2%
Concurrent title II/title XVI	39,469	+ 7%
Title XVIII	1,723	+ 4%
Title IV (B.L.)	87	+ 13%
Total	152,896	+ 19%



Processing Times and Age of Pending

	FY 1982	Change from FY 1981
Mean Processing Time	174 days	+ 10 days
Mean Age of Pending (EOY)	124 days	+ 5 days

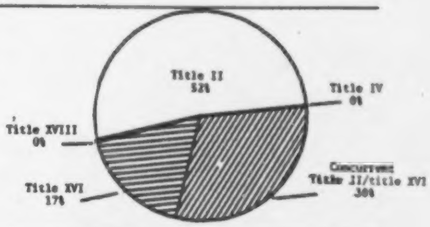
Percentages may not add up to 100 due to rounding.

REVIEWS BEFORE COUNCIL 1/

FY 1982

Receipts

	Number	Change from FY 1981
Title II		
DIB	34,366	↑ 32%
RSI	1,501	↑ 1%
Title XVI	11,833	↑ 10%
Concurrent title II/title XVI	20,909	↑ 21%
Title XVIII	285	↓ 18%
Title IV (B.L.)	41	↑ 71%
Total	68,935	↑ 23%

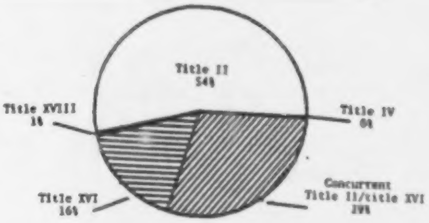


Dispositions

	Affirmed	Reversed	Remanded	Denied	Dismissed	Total	Change from FY 1981
Title II							
DIB	135 (0%)	1,315 (4%)	2,555 (8%)	26,242 (85%)	756 (2%)	31,003	↑ 22%
RSI	34 (2%)	144 (10%)	90 (6%)	1,147 (79%)	41 (3%)	1,456	↓ 4%
Title XVI	45 (0%)	504 (4%)	748 (7%)	9,653 (86%)	327 (3%)	11,277	↑ 10%
Concurrent title II/title XVI	66 (0%)	814 (4%)	1,411 (7%)	16,729 (86%)	490 (3%)	19,510	↑ 18%
Title XVIII	3 (1%)	37 (14%)	77 (28%)	145 (53%)	10 (4%)	272	↓ 23%
Title IV (B.L.)	10 (24%)	5 (12%)	2 (5%)	24 (59%)	- (0%)	41	↑ 78%
Total	293 (0%)	2,819 (4%)	4,883 (8%)	53,940 (85%)	1,624 (3%)	63,559	↑ 17%

Pending

	Number	Change from 09/30/81
Title II		
DIB	7,198	↑ 88%
RSI	280	↑ 19%
Title XVI	2,220	↑ 33%
Concurrent title II/title XVI	4,042	↑ 53%
Title XVIII	74	↑ 21%
Title IV (B.L.)	10	- 0%
Total	13,824	↑ 64%



Percentages may not add up to 100 due to rounding.

1/ Includes cases taken on own motion review.

CIVIL ACTIONS

New Court Cases Received

	Number	Change from FY 1981
Total	12,045	+ 33%

SOURCE: Office of General Counsel (OGC).

U.S. District Court Actions

	Number	Change from FY 1981
Reversed	1,145	+ 13%
Affirmed	4,131	+ 3%
Dismissed	422	+ 45%
Remanded 1/	3,705	+ 14%
Total 2/	5,698	+ 6%

SOURCE: Office of Operational Policy and Procedure (OOPP)

1/ All U.S. Court remands to OHA which are not included in total.

2/ Includes only those cases for which court orders were received indicating final court disposition.

Court Remands - Processed By OHA

	Number	% of Total
Affirmed	1,361	38%
Reversed	1,917	54%
Other	286	8%
Total	3,564	100%

SOURCE: OHA/Division of Civil Actions

Percentages may not add up to 100 due to rounding.

Operational Report of the Office of Hearings and Appeals

September 30, 1982

Department of Health and Human Services
Social Security Administration
Office of Hearings and Appeals
SSA Pub. No. 70-032 (5-83)

Operational Report
of the Office of Hearings and Appeals

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I. Associate Commissioner's Statement

The past year has seen tremendous activity and change in the Office of Hearings and Appeals (OHA) as we launched initiatives to meet the critical challenges facing us—the rapidly increasing workload, the need for greater consistency and quality in the decisionmaking process and the need for improved management practices and techniques.

We made steady progress in building the capacity to process our growing workloads. As expected, the number of requests for hearings rose to 320,680, which is a 13.8 percent increase over FY 1981. For FY 1983 we estimate that requests for hearing will exceed 360,000, which is more than an 11 percent increase over FY 1982 and a 27 percent increase over FY 1981. Requests for review before the Appeals Council grew from 55,912 in FY 1981 to 68,935 in FY 1982. During the next fiscal year we estimate the Appeals Council will receive over 96,300 cases. This is a 72.3 percent increase since FY 1981. During the past year we were successful in acquiring additional budgetary and personnel resources, most notably 140 new Administrative Law Judges (ALJ). In addition to these resources, we continued our efforts to find other ways to increase our capacity to handle the workload. For instance, we implemented new organizational and workflow arrangements in hearing offices and obtained additional equipment to enable the staff to perform case processing functions more expeditiously. Most importantly, the ALJs and their support staff responded to the rising caseload by processing 296,548 cases for a record high average monthly disposition rate of 34.5 per ALJ.

We also made considerable progress toward meeting the challenge of improving the quality and consistency of our decisionmaking process. The own-motion review program mandated by Section 304(g) of P.L. 96-265 (the Bellmon Amendment) was further refined and expanded to cover 15 percent of all ALJ favorable decisions. Other initiatives aimed at improving quality include: developing a series of Social Security Rulings to ensure adjudicatory consistency; developing and conducting training courses for Administrative Law Judges, decision writers and hearing office support staff; eliminating the short-form fully favorable decision; and developing a Government Representative Project.

Our final challenge during the past year was to improve overall management of OHA. Some of the steps we took to achieve this was the development and delivery of improved training for field and Central Office managers, realignment of the Central Office organizational components and the development of strategies for dealing with OHA's growing workloads.

While we can be pleased with the success of OHA employees during the past year, we face even greater challenges in the future. As already noted, FY 1983 will bring further increases in workload. However, we do not expect to receive corresponding increases in resources. Therefore, it is paramount that we continue to experiment and use new techniques to increase our productivity while still enhancing the quality of the decisionmaking process.

Louis B. Hays

Highlights of the Current Year

- ALJ productivity reached a record high monthly average of 34.5 cases per ALJ for a total disposition of 296,548 cases.
- In March and September 1982 ALJ productivity reached a record high of 36 cases per ALJ.
- A record high receipt of 320,680 hearing requests during the year increased the pending caseload at year-end to 152,896.
- Although the average processing time for hearing cases increased to 174 days (from 164 days in FY 1981), it remains well below the high levels in FY 1975 - 1977.
- A gain of 140 ALJs increased the total ALJ corps to 814 by year's end. An additional 749 field support staff positions increased the total support staff for ALJs to 3,715.
- The total number of personnel on duty increased by 23.2 percent to 5,616 employees.
- New hearing offices opened in Bronx, New York; Savannah, Georgia; Dayton, Ohio; and Grand Rapids, Michigan.
- Regional hearing offices opened in Philadelphia, Pennsylvania; Chicago, Illinois; and, Kansas City, Missouri, and a national hearing office opened in Arlington, Virginia.
- With the opening of four new hearing offices, three regional hearing offices, and a national hearing office, the number of offices open throughout the United States increased to 135.
- A contract was awarded in August 1982 to provide each OHA hearing and regional office with state-of-the-art word processing equipment. Nationwide installation is to be completed by May 1983.

II. FY 1982 Achievements

During Fiscal Year 1982 OHA pursued three major objectives. These objectives were to increase workload capacity, increase the quality and consistency of the decisional process and to improve management of the agency.

Workload Capacity

In order for OHA to process the projected increases in the number of requests for hearings and requests for review by the Appeals Council, it was critical that action be taken to increase our ability to process cases. Despite personnel cutbacks within the Department, OHA successfully petitioned for an increase in the number of ALJs. During the year, we hired 140 ALJs bringing the total number of ALJs to 814 on September 30. This represents an increase of 17 percent over the previous year. In order to provide staff support for these ALJs, we filled an additional 749 positions. The overall support staff to ALJ ratio increased from 4.4:1 at the end of FY 1981 to 4.7:1 at the end of FY 1982. This was still short of the agency's ultimate goal to achieve a ratio of 5:1.

It should be noted that the new ALJs came on board in four increments—November 1981, February, May and August 1982. Past experience has shown that on the average it takes approximately a year for a new ALJ to become fully productive.

OHA also utilized intermittent employees under the When Actually Employed (WAE) program as a way to indirectly increase the support staff ratio for ALJs while at the same time conserving curtailed travel funds. WAEs assist ALJs in conducting hearings at remote hearing sites on an as-needed basis. Hearing assistants who would normally accompany ALJs on the hearing trips are able to remain in the office preparing cases for hearing or following up on post-hearing development.

In addition to increasing resources, OHA undertook other initiatives to increase productivity. For instance, permanently increasing the staff of all hearing offices which are occasionally backlogged or short of staff was not feasible. Therefore, we opened three Regional Hearing Offices (Philadelphia, Pennsylvania; Chicago, Illinois; and Kansas City, Missouri) and one National Hearing Office (Arlington, Virginia). The Regional Hearing Offices assist those hearing offices within their particular region which have the greatest case backlog on an as-needed basis. The National Hearing Office performs the same function for all hearing offices across the country. These offices allow for greater flexibility and efficiency in handling temporary increases in workloads or shortages of ALJs in particular offices without having to borrow resources from other hearing offices. Each ALJ assigned to these offices travels up to 75 percent of the time.

Since the contracting process takes a great deal of time to complete and installation of all the word processing equipment is not expected until May 1983, OHA established two remote word processing centers on a pilot basis. We designed the program to reduce typing imbalances and backlogs in areas of the country with a critical need. We established the pilot centers in New York City and Chicago and will operate them for a period of one to two years. We will then evaluate them to determine their efficiency and cost-effectiveness. We selected hearing offices to participate in the program based on their proximity to the typing centers, typing imbalances and backlog history, large number of receipts and, in Region II, court-imposed time limits. Depending upon the success of the pilot program, we may establish remote typing centers in other suitable areas of the country.

Quality and Consistency

In addition to developing the new standardized text, OHA undertook several initiatives to improve the quality and uniformity of the decisional process. Along with other components of SSA, OHA devoted a great deal of resources during the past year to developing a series of Social Security Rulings (SSR). These SSRs provide SSA's interpretation on the more complex and difficult areas of the disability program policy. The SSRs developed during the past year will be published in FY 1983. These SSRs will for the first time establish a single set of standards for all of SSA to use in adjudicating disability cases.

A major effort during the past year to promote greater consistency and accuracy of hearing decisions was the implementation of the Congressionally mandated own-motion review program, commonly referred to as the "Bellmon Review." Under the Bellmon Review program, the Appeals Council, on its own-motion, formally reviews ALJ decisions that do not appear to be correct and, where the decision is incorrect, either reverses the ALJ's decision or remands the case to the ALJ for further proceedings. We limited the initial phase of the pre-effectuation ongoing review program to approximately seven and one-half percent of all title II and title II/XVI concurrent disability allowance decisions issued by a group of hearing offices and individual ALJs selected on the basis of allowance rates of 70 percent or higher, and 75 percent or higher, respectively. We used allowance rates as the basis for selecting the initial review group, both because of Congressional intent and because studies had shown that decisions in this group would be the most likely to contain errors which would otherwise go uncorrected. We also used this procedure in order to make the most efficient use of resources while correcting the greatest number of faulty hearing decisions. On April 1, we enlarged the Bellmon review to include 15 percent of ALJ disability allowance decisions, and the case selection criteria for the Bellmon program were redesigned and expanded. Under this expansion, the group of ALJs selected on the basis of high allowance rates is just one of several components of the review. A national random sample of ALJ allowance decisions, without regard to any ALJ's allowance rate, now accounts for approximately 25 percent of the total reviewed cases. The expanded Bellmon review also includes cases identified and referred to the Appeals Council by the Office of Disability Operations (ODO). In addition, the program includes a review of decisions from new ALJs. One other change has been to remove entire hearing offices from the review.

During this fiscal year, we reviewed 12,236 allowance decisions. The own-motion rate for all of these cases is 18.1 percent. However, the rates vary significantly depending on the category of the review. The highest own-motion rate, 61.8 percent, exists in the ODO protests. The next highest category is the group of individual ALJs, 20.3 percent. These rates are contrasted by the rates for the new ALJs, 13.7 percent, and the random sample, 11.5 percent.

In December 1981 the Associate Commissioner decided to improve the decisional quality of fully favorable decisions by eliminating the use of the short-form format. This type of decision provided only a conclusion of law without supporting rationale or findings of fact. ALJ decisions, whether they are allowances or denials, now contain a full rationale for the decision. To facilitate the transition to the new decision format, we eliminated the short-form decision format gradually. As of the end of the fiscal year the new decision format had been implemented nationwide with the exception of a few hearing offices.

During the past year OHA developed the Government Representative Project (GRP). The purpose of the project is to determine whether the participation of an SSA representative will improve the hearing process. The project will include almost all cases involving the issue of disability within the designated service area of the five hearing offices selected to participate. SSA representatives will be responsible for preparing the case for hearing. This will include such actions as examining the record for completeness, determining the need for additional evidence and initiating action to obtain this evidence. In cases where the claimant has legal representation, the SSA representative will also participate during the hearing to call and question witnesses and otherwise state SSA's position. The project will be implemented in FY 1983 and continue for approximately a twelve-month period. Based on the results of the project, it may be extended to other hearing offices.

Another major effort during the year to improve the quality of the decisions issued was the field training initiative. Under this initiative we redesigned the training course for new ALJs to give greater emphasis to case studies. For veteran ALJs we developed a continuing education course which dealt extensively with adjudicative and programmatic topics such as use of vocational experts, sequential evaluation of disability and evaluating evidence and determining the credibility of testimony. During the year we delivered nine of these continuing education courses to approximately 335 ALJs.

We also developed a two-week course to train decision writers in OHA's field offices. All new staff attorneys and hearing analysts must complete the course within their first three months of service. The course concentrates on disability adjudication by sequential evaluation, decision writing, review of the body systems, SSI and RSI. We also developed a three-day refresher program based on this course for experienced staff attorneys and hearing analysts. Half of all existing decision writers will be scheduled for this training each year. In this way all decision writers can receive refresher training every other year. Since it was not economically feasible to develop classroom training programs for all of the functions performed within a hearing office, we developed a self-instructional support staff training package and sent it to all hearing offices. The package contains 28 segments covering the major categories of duties performed by hearing office support staff. We based the format on specific job tasks rather than on job titles so that it can be used by reconfigured or traditional unit offices. Hearing offices will use the package for in-office training of new employees as well as for refresher training for more experienced employees or for those changing job duties.

Management

During FY 1982, we developed a national management training program emphasizing increased knowledge of such management issues as labor relations, equal opportunity, and improved day-to-day management techniques. Both the ALJICs and Hearing Office Managers participated in the training to ensure consistency between the areas of program and administrative management in the hearing offices. Three regions received training during the year. The remaining regions will receive training in FY 1983. We designed a similar course for Central Office supervisors which will be delivered during FY 1983.

We made several organizational changes within Central Office in order to provide improved management, administrative services and accountability. In order to streamline operations we abolished the Deputy Associate Commissioner (Operations) position and modified the position of Deputy Associate Commissioner (Program) to make it a full deputy position without line authority. Because of the increased emphasis on program management in the field, we gave the Chief Administrative Law Judge's office an additional position for another Deputy Chief Administrative Law Judge. Also, we created a new Office of Management Services (OMS) by combining the Office of Facilities and Personnel Administration and the Office of Management Coordination. OMS can now provide better coordinated support services to both Central and field offices.

During the past year we planned and implemented a systems modernization plan for OHA. Part of this plan includes the previously mentioned acquisition and installation of state-of-the-art word processing equipment in all of the OHA field offices. Coupled to this initiative OHA is developing specifications for adding user programming and telecommunications features in order to provide data entry/retrieval and distributed processing capabilities to our field offices. This will enable us to decentralize our case control system operations. Data entry, retrieval and data processing functions will take place at the source where the data is generated — the field and Central Office locations. Currently, field offices must submit handwritten forms to their Regional Office for input on the SSA computer system. This not only causes delays in data entry and retrieval but also results in large bottlenecks at the Regional level, especially when the computer system is inoperable due to maintenance problems. The new system will also result in improved management reports.

In order to improve case flow within Central Office we established a Docket and File Module on a trial basis within one branch in the Office of Appeals Operations (OAO). The module assumes responsibility for a claim file once a claimant files a request for review with the Appeals Council. One objective of this initiative is to achieve a decentralized system which will significantly improve association of post-review correspondence with the claim file. Another aim is to provide for easy accessibility and retrieval of claim files in the event of a court action. Previously the Docket and Files Branch within OMS had the responsibility of maintaining all case files. In its first few months of operation the Docket and File Module in OAO met its objectives and we developed plans for incorporating docket and file modules into additional OAO branches during FY 1983.

OHA also experimented with innovative organizational structures and methods of processing the workload in order to enhance the productivity of the staff already on board. One successful organizational structure, which we expanded to 48 hearing offices by the end of the fiscal year, is reconfiguration. Under reconfiguration, hearing offices are structured according to functional areas instead of the traditional unit concept, where each ALJ has a small support staff processing only his/her cases. Reconfiguration frees ALJs from the majority of administrative duties, diminishes the impact of staff absences, enables the staff to be used more efficiently and improves overall caseflow. Fully reconfigured hearing offices have been able on the average to hear and decide more cases than traditionally structured offices.

In order to investigate innovative procedures used in the field and analyze their suitability for national implementation, we established a Hearing Office Innovations Staff (HOIS) in January. HOIS has investigated ideas as simple as modifying a mail handling procedure and as complex as establishing a workload control and accountability system for an entire hearing office. HOIS has also served as a conduit for the exchange of information between the field offices and Central Office. We expect the techniques and methods promoted through HOIS to result in increased productivity throughout the coming years.

We refocused the OHA Newsletter to concentrate on program activities involving the Central, Regional and field offices so as to increase the exchange of successful operating and management techniques. The newsletter also serves to transmit legislative/regulatory changes, alert OHA employees to sources of technical assistance and explain Central Office initiatives.

A major effort to increase productivity was upgrading hearing office equipment. In August, OHA was able to enter into a contract to provide all hearing offices with state-of-the-art word processing equipment. In addition to printing decisions faster, the equipment has several features which will help the support staff type decisions in a shorter time. For instance, the word processing system has a system glossary which will allow the typist to merge original and standardized material.

In conjunction with the acquisition of the new word processing equipment, OHA developed a new standardized text guide. The guide is being distributed to the hearing offices on a schedule which coincides with the installation of the new word processing equipment. The text is prerecorded as part of the equipment's stored memory capability. The revised text contains separate decisional formats for allowances and denials in both initial and cessation disability cases under Titles II and XVI, as well as samples for use in non-disability issue cases under Titles II, XVI, and XVIII.

III. Overview of OHA Operations

The Social Security Administration's (SSA) Office of Hearings and Appeals (OHA) is responsible for administering the appeals process under various titles of the Social Security Act. This process enables a claimant who has received an unfavorable decision by SSA to seek redress by presenting his or her case at a hearing before an OHA Administrative Law Judge (ALJ). The claimant and/or a representative are allowed to present testimony and evidence at a hearing before an ALJ. As an alternative, the claimant may submit evidence in writing and request that a decision be made based on the record. The ALJ must weigh all the relevant evidence and render a decision in accordance with applicable Social Security laws and regulations.

When a claimant is dissatisfied with an ALJ decision he or she may request review by the Appeals Council of OHA. The Council can affirm, modify, reverse or remand the original ALJ decision. This is the last level at which a claimant can seek a favorable decision through the administrative process. However, a claimant may still appeal his case to a United States District Court. The Appeals Council may also review ALJ decisions on its own-motion. Disability cases under the Supplemental Security Income (SSI) program, title XVI, and Disability Insurance (DI), title II, account for approximately 97 percent of OHA's caseload. The remaining caseload consists of claims made under the following programs: Retirement and Survivors Insurance (RSI), title II; Health Insurance, title XVIII; Professional Standards Review Organizations (PSRO), title XI; and the Black Lung Program, Title IV.

SSI provides assistance payments to aged, blind and disabled individuals who qualify on the basis of need. The SSI program is funded from Federal general revenues. ALJs hearing cases must frequently determine the extent of a claimant's disability and financial need in order to decide if the claimant meets the program's eligibility criteria.

RSI and DI are trust fund programs which provide monthly cash benefits to contributing workers and/or their dependents when their earnings stop or are reduced due to retirement, death, or disability. Monthly benefits are related to the worker's average monthly earnings over a specified number of years while contributing to the trust funds. The major issues involved in these cases are determining what constitutes disability, meeting time requirements for contributing to the funds, and amount of benefits.

Title XVIII, Part A, hospital insurance, pays for hospital services as well as post-hospital skilled nursing facility care and home health services. Part B, supplementary medical insurance, helps pay for doctor's services, outpatient hospital services, and many other medical items and services not covered under part A. Since both of these parts are for the benefit of workers who have contributed to special trust funds, requests for OHA hearings often involve such issues as a claimant's eligibility as well as the extent to which the program will cover certain charges by providers of health care. Occasionally cases arise under this title involving physicians or practitioners of health care who have been convicted of a criminal offense related to their involvement in the Medicare or Medicaid programs, have been barred by the Secretary from further participation in those programs and are seeking a reversal of the Secretary's decision.

The Black Lung program, title IV of the Federal Mine Safety and Health Act of 1977, provides benefits to miners totally disabled by black lung or upon their death to their survivors.

PSROs make judgement on the medical necessity and quality of health care furnished under the Medicare, Medicaid and Maternal and Child Health programs and are designed to assure the appropriate use of health care resources. They also determine whether the level of medical care proposed to be provided or actually being rendered is consistent with professionally recognized standards.

In fiscal year 1982 OHA ALJs conducted in excess of 296,000 hearings and the Appeals Council considered over 63,000 cases which included claimant request for review and own-motion cases. At the end of the year OHA's workforce consisted of more than 5,600 employees, including a corps of over 800 ALJs. Total administrative costs were approximately $180 million. OHA's activities are conducted from its central headquarters in Arlington, Virginia, 10 regional offices and 135 hearing offices located throughout the United States.

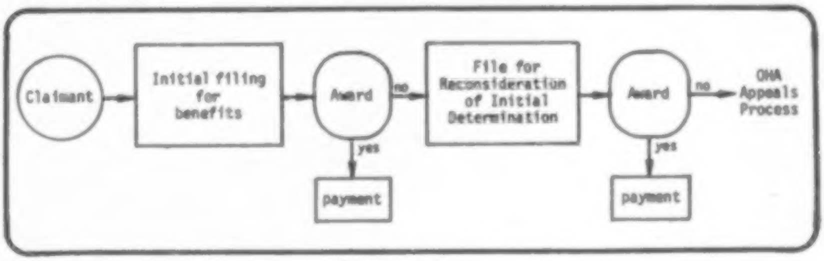
IV. The Appeals Process

Hearing

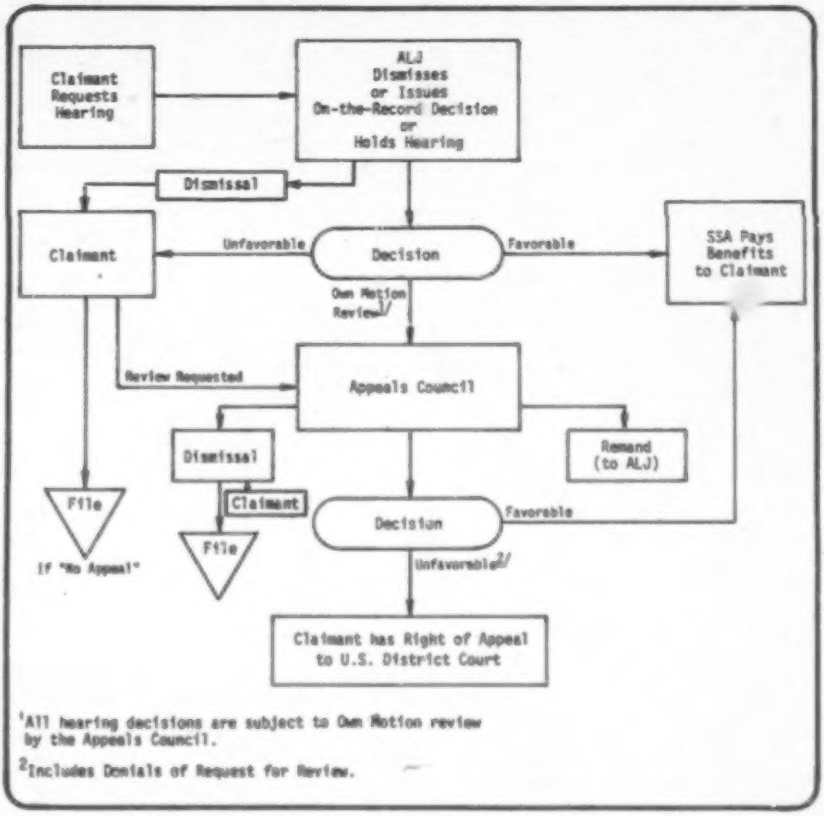
An applicant for Social Security benefits who has been denied at both the initial determination level and at the reconsideration level may request a hearing before an ALJ. For some disability cases under the SSI program, a claimant can request a hearing after the initial determination is made. The request for hearing must be made by the claimant and/or his legal representative within 60 days from the date of receipt of the notice of reconsidered determination. The claimant may request either an oral hearing or that a decision be made based on the record. Upon reviewing the case the ALJ can issue a written dismissal of the request for hearing if the case does not meet certain regulatory criteria. At a hearing, testimony is given under oath or affirmation and is recorded verbatim. The ALJ must inquire fully into the issues, receive in evidence the testimony of witnesses and relevant documents, and allow the claimant and/or the claimant's legal representative to present arguments and examine witnesses. If additional evidence is necessary, the ALJ can request assistance from other components of SSA or from the State agency involved in the initial decision.

After the hearing or review of the case record, the ALJ issues a decision in writing. The decision can affirm, reverse or modify the previous administrative determinations. A copy of the decision is mailed to the claimant and legal representative, if any, with notice of the right to request review of the hearing decision by the Appeals Council. A request for review must be made within 60 days of receipt of the notice.

Overview of SSA Claims and Reconsideration


Claimant
Initial filing for benefits
Award
no
yes
payment
File for Reconsideration of Initial Determination
Award
no
OHA Appeals Process
yes
payment

OHA Appeals Process


Claimant Requests Hearing
ALJ Dismisses or Issues On-the-Record Decision or Holds Hearing
Dismissal
Claimant
Unfavorable
Decision
Favorable
SSA Pays Benefits to Claimant
Own Motion Review1/
Review Requested
Appeals Council
Dismissal
Remand (to ALJ)
Claimant
File
If "No Appeal"
File
Decision
Favorable
Unfavorable2/
Claimant has Right of Appeal to U.S. District Court

[1] All hearing decisions are subject to Own Motion review by the Appeals Council.

[2] Includes Denials of Request for Review.

Appeals Council Review

Upon receipt of a claimant's request for review of a hearing decision, the Appeals Council considers the evidence of record, additional evidence submitted by the claimant with the request for review, and the ALJ's findings and conclusions as written in the decision. The Council may grant, deny or dismiss a request for review. The Council will normally review a hearing decision when (1) there appears to have been an abuse of discretion by the ALJ, (2) there is an error in law, (3) the hearing decision is not supported by substantial evidence, or (4) there is a broad policy or procedural issue involved.

When it grants review, the Council may issue a decision which affirms, modifies or reverses the hearing decision. However, if the Council reviews a case and determines that additional evidence is required, it will generally remand the case to an ALJ for receipt of the evidence, further proceedings and a new decision. The Council may also vacate a hearing decision and dismiss the claimant's request for hearing for any reason which would have justified such dismissal by the ALJ. The Appeals Council may also consider a case on its own-motion when the hearing decision does not appear to be in accord with the law and regulations. As a result of Public Law 96-265 (the Bellmon Amendment) the Appeals Council's own-motion review authority must be exercised to include review of administrative law judge allowance decisions. In any case in which the Council takes own-motion, it may remand the case to an ALJ for additional development and/or a rehearing and issuance of a new decision, or undertake any necessary development itself, and then issue a decision affirming, modifying or reversing the hearing decision.

Legal Recourse

A claimant, who has either been denied a request for review or received an unfavorable decision by the Appeals Council, may file a civil action with a U.S. District Court. The civil action must be filed within 60 days after the claimant's receipt of the notice of the Council's action in the case. However, this time limit can be extended by the Council, if the claimant can show good cause for not meeting the deadline. The Federal courts are bound by the Secretary's findings of fact provided they are supported by substantial evidence. A court, upon reviewing a case record, may find there is insufficient documentation to support the decision and may remand it to OHA for additional evidence. Also the court can show that it is pertinent and that there was good cause for the claimant's failure to incorporate it into a prior proceeding. The Department may also request the court to remand the case upon showing good cause. The Secretary's new decision must be filed with the court. If the new decision is not fully favorable to the claimant and the claimant desires to continue litigation, a complete transcript of the entire administrative proceedings must also be filed with the court. If the U.S. District Court reviews the case record and does not find in favor of the claimant, the claimant can continue with the legal appeal process—to the appropriate U.S. Circuit Court of Appeals and ultimately to the Supreme Court of the United States. The Department has the same appeal rights.

Ordinarily, in order to obtain judicial review, an individual must exhaust all of the administrative appeals steps. However, where an individual: (1) has received a determination or decision at the reconsideration level or higher; (2) has no dispute with the findings of fact and application and interpretation of the controlling laws beyond a contention that a section of the applicable law is unconstitutional; and (3) pursues, as the sole remaining issue, a challenge to the constitutionality of the pertinent statute which precludes favorable action in the claim, the individual may be permitted to file a civil action in the U.S. District Court without pursuing further administrative appeals steps.

Health Insurance Hearings and Appeals

In order for a claimant to initiate the appeals process involving a Medicare Hospital Insurance (title XVIII, Part A) case, the amount in controversy must be at least $100.

Cases involving institutional and non-institutional providers of medical services under Medicare and Medicaid (titles XVIII and XIX) who have been denied participation based on a decision by the Health Care Financing Administration (HCFA) use essentially the same appeals procedures described earlier. The major difference is that HCFA also becomes a party to the appeals process. As such, it also has the right to present arguments and examine witnesses at the hearing, and request a review by the Appeals Council, if the ALJ decision is unfavorable to the agency.

A laboratory, portable X-ray supplier or end stage renal disease treatment center which has received an unfavorable review by the Appeals Council is not entitled to judicial review by the courts.

V. Staffing and Budget

OHA is directed by an Associate Commissioner who reports directly to the Commissioner of SSA. OHA's activities are divided into three major areas: program, management operations and field administration.

The program area encompasses the development of policy and procedural matters within OHA and with other SSA/HHS components, operation of the medical and vocational consultants programs and the selection of the analysis of cases for Appeals Council review. Management operations involve administrative functions required for the day-to-day operation of OHA and quality control. Technical assistance in and monitoring of policy, program and procedural matters is provided to the ten Regional Offices and 135 hearing offices by field administration.

During FY 1982, total personnel on duty increased 23.2 percent over the previous year, which resulted from a 17.0 percent increase in ALJs, a 25.8 percent increase in field support personnel and a 19.5 percent increase in Central Office staff. The ratio of support staff (decision writers, hearing assistants, hearing clerks, typists and hearing office management personnel) to ALJs has increased from 4.4 to 4.7.

During FY 1982 four ALJ classes were conducted and resulted in 125 new ALJs being assigned to hearing offices. In addition, fifteen ALJs were reinstated to the corps.

The increase in Central Office staff was due primarily to 71 hearing analysts being added to the Office of Appeals Operations. These analysts were necessary in order to handle the increased case review workload.

Total expenditures increased 18.8 percent over FY 1981 expenditures. As the following table indicates, there was an increase in "Personnel Compensation and Benefits" of over $21.9 million. This 17.4 percent increase over FY 1981 resulted from a 4.8 percent increase in funds required for staff and comparability pay raises. Funds expended under "Other" categories increased 25.3 percent. Included are costs for rental of space for hearing offices, equipment rental and purchase, travel, and contractual services. All of these items were affected by rising prices. Additionally, OHA had to rely more heavily on the use of contractual services for the services of vocational and medical experts.

The growth in OHA funds expended, by category, is tabulated by selected fiscal year as follows:

OHA Funds Expended

(000 Added)

Category	1965	1970	1975	1980	1981	1982
Personnel Compensation and Benefits	$9,662	$18,171	$58,341	$110,525	$125,783	$147,708
Other	1,408	4,011	17,225	22,953	25,728	32,246
Total	$11,070	$22,182	$75,566	$133,478	$151,511	$179,954

VI. Statistical Trends

Summary Analysis

Cases received at the initial and reconsideration levels declined in FY 1982. Although the number of claims filed at the initial level declined 21.9 percent from FY 1981, there was only a very slight decline in the number of claims filed at the reconsideration level. This can be attributed in part to title II cases reviewed under the Continuing Disability Investigation (CDI) program. The Congressionally mandated CDI program requires that State Disability Determination Services (DDS) review every three years the disability status of beneficiaries who are not permanently disabled. When a claimant's benefits are terminated under the CDI review, the claimant has the right to request reconsideration of the decision and, if necessary, to use the OHA appeals process. At the end of the fiscal year, OHA had received over 61,000 requests for hearing for CDI cases. These CDI cases have resulted in a significant increase in OHA's caseload.

Receipts at Various Decisional Levels

	FY 1981	FY 1982	Change
Initial Claims Received[1]	7,020,900	5,481,700	-21.9%
Requests for Reconsideration Received[1]	706,400	704,400	-0.3%
Hearing Requests Received	281,737	320,680	+13.8%
Reviews Before Council Received	55,912	68,935	+23.3%
Actions Filed in U.S. District Court	9,055	12,045	+33.0%

[1] Excludes Health Insurance and Black Lung

As indicated by the following data, in FY 1982 there was a significant increase in hearing request workloads, number of employees, and funds expended over FY 1981.

Workloads, Personnel and Expenditures

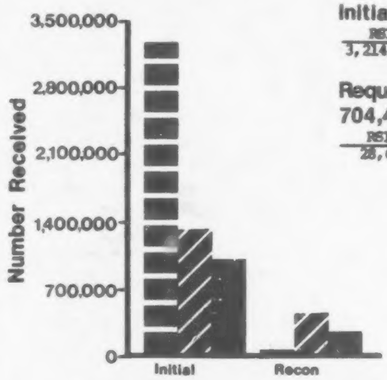
Category	FY 1981	FY 1982	Change
Workload (Hearing Requests)	281,737	320,680	+13.8%
Personnel	4,559	5,616	+23.2%
Funds	$151,510,474	$179,953,933	+18.8%

The percentage of decisions reversed at the various levels of review are shown in the following table. Decisions allowed by ALJs have shown a gradual increase over the years and in FY 1980 and FY 1981 had reached over 55 percent. However, it should be noted that allowed decisions which began to decline in FY 1981 for the first time since FY 1974 continued to decline in FY 1982 to 52.7 percent. In comparison, CDI and non-CDI allowance rates for the last eight months of FY 1982 were 61.3 percent and 50.0 percent respectively. The number of decisions reversed by the Appeals Council had been on the decline from FY 1975 - FY 1978. The decline during this period resulted from a change in the regulations designed to make the Appeals Council a ruling appellate body. Instead of conducting a "de novo" review of each appeal, the Appeals Council grants a claimant's request for review only under certain prescribed regulatory criteria. This policy has now been in effect for a sufficient time to result in a stabilization of the reversal rates. During FY 1982 there was a very slight decline in the reversal rate, down 0.4 percent from FY 1981. When a request for review is granted to obtain additional evidence the case is generally remanded to an ALJ to obtain the evidence. The ALJs allowed an average of 61 percent of the cases that were remanded by the Appeals Council from FY 1976 - FY 1980. In FY 1982, the ALJs allowed about 62 percent of the cases remanded by the Appeals Council — down from 65 percent in FY 1981. Prior to the regulatory change these cases were developed by the Appeals council which would issue a reversal when appropriate.

Decisions Reversed by Level of Adjudication

Category	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
ALJ	28.9%	41.6%	41.9%	55.8%	55.2%	52.7%
App. Council	9.6%	12.4%	8.8%	4.9%	4.8%	4.4%
U.S. District Court	34.5%	25.1%	19.1%	20.2%	24.7%	21.7%

FY 1982 Total Claims

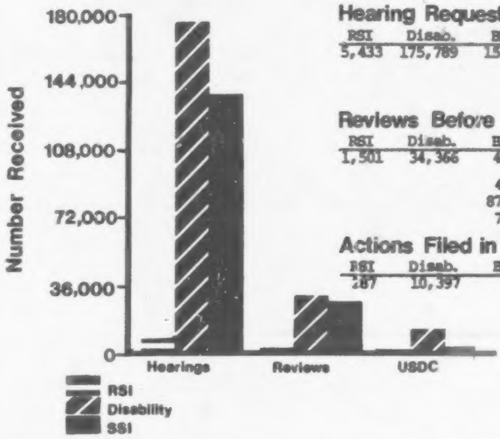


Initial Claims Received 1/ 5,481,700

RSI	Disab.	SSI Total 2/
3,214,700	1,302,900	964,100

Requests for Reconsideration Received 1/ 704,400

RSI	Disab.	SSI Total 2/
28,600	432,100	243,700



Hearing Requests Received—320,680

RSI	Disab.	BL	HI	SSI Only	SSI Conc.
5,433	175,789	154	3,419	53,112	82,773

52.7% Allowed
47.3% Denied

Reviews Before Council Received—68,935

RSI	Disab.	BL	HI	SSI Only	SSI Conc.
1,501	34,366	41	285	11,833	20,909

4.4% Reversed
87.9% Affirmed,Dismissed,Denied
7.7% Remanded

Actions Filed in USDC— 12,045

RSI	Disab.	BL	SSI 3/
287	10,397	3	1,333

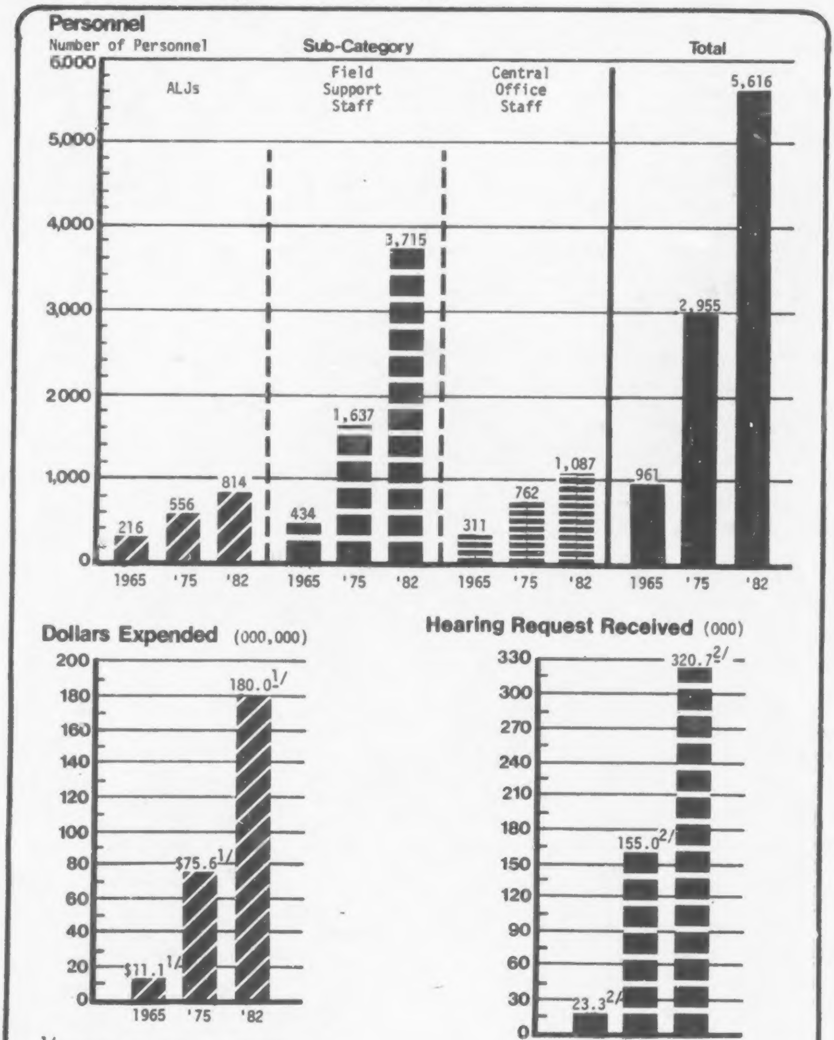
21.7% Allowed
78.3% Denied

1/ Excludes Health Insurance and Black Lung
2/ SSI breakout not available, concurrent cases are also counted in the respective RSI and Disab. categories.
3/ Concurrent DI-SSI disability cases are included in Disab. category.

NOTE: Continuing Disability Investigations (CDIs) are included for title II disability cases at the reconsideration level; whereas, at the hearings, appeals and court levels CDIs are included for title II, title XVI, and concurrent title II/XVI disability cases.

Growth Yardsticks

Office of Hearings and Appeals, FY 1965 - FY 1982



Personnel

Dollars Expended (000,000)

Hearing Request Received (000)

[1] Rounded to nearest $100,000.

[2] Rounded to nearest 1,000.

NOTE 1. Personnel are defined as permanent, full-time, on-duty personnel and excludes LWOPs.
NOTE 2. FY1982 funds are estimated.

ALJ Hearings

A record high of 320,680 hearing requests was received in FY 1982. Requests for Title II disability hearings (including Disabled Widow/Widowers Insurance Benefits) increased 28.9 percent over FY 1981, and represent the largest category of cases received by OHA—54.8 percent of total receipts in FY 1982.

SSI (including concurrent SSI) requests received declined slightly in FY 1982; however, they represented the second largest category of cases received by OHA—42.4 percent of total receipts in FY 1982. Health Insurance Benefits—Supplemental Medical Insurance Benefits receipts increased in FY 1982—15.7 percent over FY 1981. Retirement and Survivors Insurance (RSI) receipts continued to decline in FY 1982—5.8 percent from FY 1981.

In FY 1982, dispositions increased 12.9 percent over FY 1981. Hearing requests pending an ALJ final decision reached a record high of 152,896 cases—up 18.7 percent over FY 1981. ALJ final actions categorized as favorable (allowed) or unfavorable (denied/dismissed) to the claimant are tabulated for selected years as follows:

ALJ Dispositions on Hearings

Action	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Favorable	28.9%	41.6%	41.9%	55.8%	55.2%	52.7%
Unfavorable	71.1%	58.4%	58.1%	44.2%	44.8%	47.3%

In FY 1982, 12.9 percent more fee petitions were processed in RSDHI and SSI claims than in FY 1981 (58,960 in FY 1981 to 66,572 in FY 1982). The average fee approved in FY 1982 was $1,183.54 for all programs ($1,102.59 in FY 1981) for a total of more than $79 million ($65 million in FY 1981). The number of total dispositions involving attorney participation has shown a generalized upward trend since FY 1970. The participation of attorneys has more than doubled from 20 percent of the cases in FY 1970 to 44 percent in FY 1982. Participation of non-attorneys gradually increased from 6 percent in FY 1970 to 15 percent in FY 1980. However, in FY 1981 the trend reversed, and in FY 1982 non-attorney participation had declined to 11 percent as tabulated for selected years:

Participation of Representatives in Hearing Dispositions

Representative	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Attorney	20%	37%	41%	42%	44%
Non-Attorney	6%	10%	15%	14%	11%

Participation of Representatives at Hearings Held

Representative	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Attorney	N.A.	N.A.	48%	55%	59%
Non-Attorney	N.A.	N.A.	15%	18%	14%

Administrative Law Judge Actions on Hearing Requests

Actions	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Allowed	6,754	16,005	50,709	129,713	144,830	156,349
Denied	14,578	18,542	58,423	80,324	91,490	111,064
Dismissed	2,061	3,933	11,894	22,562	26,289	29,135
Total	23,393	38,480	121,026	232,599	262,609	296,548

Hearing Requests
Received, Disposed, Pending by Program

Requests	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Received						
HIB-SMIB		2,324	1,518	2,800	2,955	3,419
DWIB		2,224	3,721	6,257	6,522	6,039
RSI	3,106	3,124	2,528	6,336	5,768	5,433
Disability	20,217	34,901	74,780	114,234	129,804	169,750
Black Lung			19,515	161	175	154
SSI Only			28,677	53,256	57,592	53,112
SSI Conc.			24,223	68,979	78,921	82,773
Total	23,323	42,573	154,962	252,023	281,737	320,680
Disposed						
HIB-SMIB		1,735	1,822	3,160	2,516	3,350
DWIB		2,234	3,102	5,683	6,541	6,162
RSI	3,292	3,000	2,555	5,946	5,847	5,379
Disability	20,101	31,511	63,915	104,657	119,572	147,970
Black Lung			28,492	159	158	167
SSI Only			12,677	50,839	54,937	53,485
SSI Conc.			8,463	62,155	73,038	80,035
Total	23,393	38,480	121,026	232,599	262,609	296,548
Pending						
HIB-SMIB		890	1,150	1,215	1,654	1,723
DWIB		687	2,591	3,065	3,046	2,923
RSI	729	988	1,625	3,044	2,965	3,019
Disability	5,725	11,182	48,133	49,265	59,497	81,277
Black Lung			24,315	83	100	87
SSI Only			17,041	22,116	24,771	24,398
SSI Conc.			16,314	30,848	36,731	39,409
Total	6,454	13,747	111,169	109,636	128,764	152,896

Appeals Council Reviews

Appeals Council receipts, including cases taken on own-motion review, increased to a record high in FY 1982 of 68,935 cases (up 23.3 percent over FY 1981) resulting primarily from increases in all programs except Health Insurance Benefits - Supplemental Medical Insurance Benefits (down 18.3 percent).

In FY 1982, dispositions increased to an all time high of 63,559 (up 17.5 percent over FY 1981). With the exceptions of Retirement and Survivors Insurance and Health Insurance Benefits - Supplemental Medical Insurance Benefits, all programs had increases in case dispositions over FY 1981 with the most significant increase, 22.4 percent, in the title II disability program (including Disabled Widow/Widowers Insurance Benefits).

The total number of cases pending at the end of FY 1982 increased 63.6 percent over FY 1981 (from 8,448 to 13,824) and constitutes more than a two and one-half month backlog. Appeals Council actions categorized as favorable (reversed) or unfavorable (affirmed, dismissed, denied) to the claimant and actions remanded back to the ALJ are tabulated for selected years as follows:

Appeals Council Dispositions

Action	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Reversed	9.6%	12.4%	8.8%	4.9%	4.8%	4.4%
Affirmed, Dismissed & Denied	86.3%	84.4%	88.3%	87.1%	87.6%	87.9%
Remanded	4.1%	3.2%	2.9%	7.9%	7.6%	7.7%

Actions on Reviews Before Appeals Council

Actions	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Reversed	797	1,380	2,660	2,447	2,614	2,819
Affirmed	710	769	1,495	208	184	293
Dismissed	298	407	682	1,329	1,378	1,624
Denied 1/	6,171	8,184	24,374	41,565	45,813	53,940
TOTAL 2/	7,976	10,740	29,211	45,549	49,989	58,676
Remanded	344	354	852	3,917	4,106	4,883

1/Includes declined and other.
2/For final decisions.

Reviews Before Appeals Council
Received, Disposed, Pending by Program

	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Received						
HIB-SMIB		483	308	549	349	285
DWIB		840	786	1,368	1,497	1,533
RSI	1,265	1,147	983	1,636	1,487	1,501
Disability	7,520	8,799	15,388	20,965	24,574	32,833
Black Lung			15,918	6	24	41
SSI Only			1,974	9,869	10,704	11,833
SSI Conc.			1,320	15,349	17,277	20,909
TOTAL	8,785	11,269	36,677	49,742	55,912	68,935
Disposed						
HIB-SMIB		373	363	718	354	272
DWIB		823	720	1,369	1,475	1,509
RSI	1,331	1,096	1,004	1,466	1,522	1,456
Disability	6,989	8,802	13,084	21,663	23,846	29,494
Black Lung			14,270	31	23	41
SSI Only			378	9,700	10,290	11,277
SSI Conc.			244	14,519	16,585	19,510
TOTAL	8,320	11,094	30,063	49,466	54,095	63,559
Pending						
HIB-SMIB		161	106	66	61	74
DWIB		145	268	220	242	266
RSI	173	318	227	270	235	280
Disability	1,582	1,287	5,356	2,865	3,593	6,932
Black Lung			4,016	9	10	10
SSI Only			1,598	1,250	1,664	2,220
SSI Conc.			1,076	1,951	2,643	4,042
TOTAL	1,755	1,911	12,647	6,631	8,448	13,824

Federal Court Actions

New civil actions filed in the Federal Courts increased by 33 percent during FY 1982 from 9,055 to 12,045. After a slight decline in court remands during FY 1981 there was an increase in FY 1982 from 3,262 to 3,705, or 13.6 percent. U.S. District Court decisions categorized as to whether the Secretary's decision was reversed or affirmed are tabulated for selected fiscal years as follows:

Decisions by U.S. District Courts

Action	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Reversed	34.5%	25.1%	19.1%	20.2%	24.7%	21.7%
Affirmed	65.5%	74.9%	80.9%	79.8%	75.3%	78.3%

Civil Actions in U.S. Courts
Received, Disposed, Pending

Actions	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Received	941	1,531	5,052	7,814	9,055	12,045
Disposed	1,224	1,183	2,227	5,143	6,378	5,981
Pending	1,447	2,171	7,634	18,920	20,448	23,697
Adjusted				-3,045	-1,149	-2,815

U.S. District Court Actions
Reversed, Affirmed, Dismissed

Actions	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Reversed	273	198	279	935	1,317	1,145
Affirmed	518	590	1,184	3,701	4,006	4,131
Dismissed	82	172	764	223	764	422
Adjusted	+221					
Total	1,094	960	2,227	4,859	6,087	5,698

U.S. Court Remands to OHA
Received, Disposed & Pending

Remands	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Received	417	441	1,341	3,320	3,262	3,705
Disposed	344	436	1,039	3,654	3,572	3,564
Pending	245	216	953	3,002	3,686	4,039
Adjusted				+984	+994	+212

Professional Support

OHA first contracted with Medical Advisors (MA) and Vocational Experts (VE) in FY 1963. This procedure, although revised, continues each fiscal year. The MAs are used in the hearing process to give the ALJ an unbiased evaluation, either by oral testimony or written interrogatory, of the medical evidence available in the claimant's case file. These comments become part of the case file and assist the ALJ in making his/her decision on the case.

Usage of Medical Advisors

	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Under Contract	664	1,087	1,657	1,288	1,218	1,189
Number of Cases	980	3,070	7,338	12,428	13,136	18,312
Cost in Dollars	83,050	325,700	645,950	1,739,906	1,983,570	2,491,760

The use of vocational experts grew out of a landmark decision, Kerner v. Fleming, 283 F.2d 916 (1960), which placed upon SSA the burden of providing evidence of jobs the claimant could perform when it was determined that the claimant could not perform past relevant work. The medical-vocational regulations, which became effective on February 26, 1979, administratively noticed the existence of approximately 2500 unskilled occupations, each representing numerous jobs in the national economy. Where a particular table rule set forth in the regulations directs a conclusion of "not disabled," expert vocational testimony is not required to identify the specific jobs a claimant can do.

Accordingly, there was a sharp decline in the use of vocational experts. In the case of Campbell v Secretary of HHS, 665 F.2d 48 (2nd Cir. 1981), the "administrative notice" feature of the regulations was rejected. The Campbell case is now before the Supreme Court on the question of whether the Secretary may rely upon the administrative notice provisions of the regulations, rather than testimony of vocational experts, to determine the existence of substantial gainful work in the national economy. The use of vocational experts may be affected by the Supreme Court's ruling in the Campbell case.

Usage of Vocational Experts

	FY 1965	FY 1970	FY 1975	FY 1980	FY 1981	FY 1982
Under Contract	656	647	800	937	940	901
Number of Cases	5,086	8,722	23,303	32,866	38,284	49,515
Cost in Dollars	355,920	679,710	1,678,745	2,563,546	3,445,527	4,222,635

Qualified medical doctors are contracted as central office consultants to assist the OHA Appeals Council when reviewing cases brought before them.

Usage of Central Office Consultants

	FY 1976	FY 1977	FY 1978	FY 1979	FY 1980	FY 1981	FY 1982
Under Contract	56	55	48	46	36	30	34
Cost in Dollars	119,115	244,557	289,726	246,390	192,065	320,310	398,230

VII. Litigation

Time Limit Litigation

During FY 1982, the Blankenship time limit processing case in the Western District of Kentucky continued to be a major litigation concern of OHA. During FY 1982 the court issued a final appealable ruling adverse to the Secretary. In effect the court ordered the Secretary to publish regulations requiring the conduct of hearings and issuance of decisions within 180 days of the request for hearing. Thereafter an appeal was filed to the Court of Appeals for the Sixth Circuit and a stay was obtained of the District Court's holding. Nevertheless, we continue to be under court imposed time limits for the conduct of hearings and issuance of decisions in numerous jurisdictions, primarily in the Northeastern United States. In addition, in Day (District of Vermont) time limits have been imposed in the State of Vermont for processing requests for reconsideration and Appeals Council review as well as for the hearing process.

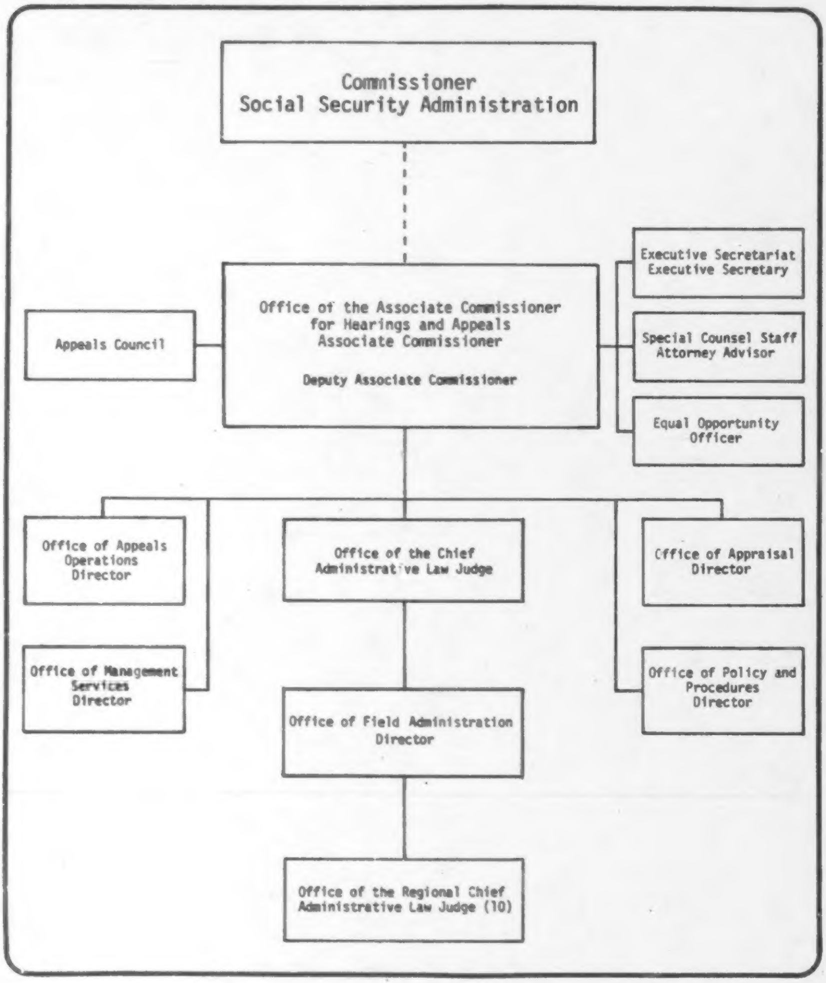
Other Litigation

In McClure et al. v. Harris, the Supreme Court unanimously reversed the U.S. District Court for the Northern District of California which had ordered the Secretary to provide an opportunity for a de novo hearing conducted by an SSA ALJ for Title XVIII, Part B, Medicare, claimants who received denial decisions from carrier-appointed hearing officers in which $100 or more remained in controversy. The court affirmed SSA's statutory hearing process and, thus, a major workload burden for OHA was avoided.

During FY 1982 the Supreme Court granted the Secretary's petition for a writ of certiorari in Schweiker v. Campbell. On November 30, 1981 the Second Circuit issued its ruling which essentially rejected the administrative notice provisions of the medical-vocational guidelines. As stated in the Secretary's brief, "the court seemed to suggest that the Secretary must prove the existence of particular jobs so that claimants may have an opportunity to show that such jobs do not exist." The holding in Campbell has been the major adverse Circuit Court decision involving the so-called "grid" regulations and is in sharp contrast with favorable holdings in other circuits such as Torres (First Circuit 1982); Santise (Third Circuit 1982); Rivers (Fifth Circuit 1982); Kirk (Sixth Circuit 1981); and Cummins (Seventh Circuit 1982). In Broz (Eleventh Circuit 1982) the court upheld the Secretary's authority to enact regulations but held that individualized consideration must be given to the effect of age on each disability claimant. The adverse decision in Campbell has been responsible for a large number of remands in New York, Connecticut and Vermont. The Secretary has had little success in obtaining stays of proceedings pending the Supreme Court's decision. The Supreme Court's final decision is expected in FY 1983.

Appendix

Organizational Chart


Commissioner
Social Security Administration
Executive Secretariat
Executive Secretary
Appeals Council
Office of the Associate Commissioner
for Hearings and Appeals
Associate Commissioner
Deputy Associate Commissioner
Special Counsel Staff
Attorney Advisor
Equal Opportunity
Officer
Office of Appeals
Operations
Director
Office of the Chief
Administrative Law Judge
Office of Appraisal
Director
Office of Management
Services
Director
Office of Policy and
Procedures
Director
Office of Field Administration
Director
Office of the Regional Chief
Administrative Law Judge (10)

OHA Regional Office and Hearing Office Locations

Region I
(BOSTON, MA)

Boston, MA
Hartford, CT
Manchester, NH
New Haven, CT
Portland, ME
Providence, RI
Springfield, MA

Region II
(NEW YORK, NY)

Albany, NY
Bayamon, PR
Bronx, NY
Brooklyn, NY
Buffalo, NY
Camden, NJ
Hato Rey, PR
Hempstead, NY
Jamaica, NY
Mayaguez, PR
New York, NY
Newark, NJ
Ponce, PR
Syracuse, NY
White Plains, NY

Region III
(PHILADELPHIA, PA)

Baltimore, MD
Charleston, WV
Charlottesville, VA
Harrisburg, PA
Huntington, WV
Jenkintown, PA
Johnstown, PA
Norfolk, VA
Philadelphia, PA
Philadelphia RHO, PA
Pittsburgh, PA
Richmond, VA
Roanoke, VA
Washington, D.C.
Wilkes-Barre, PA

Region IV
(ATLANTA, GA)

Atlanta, GA
Birmingham, AL
Charleston, SC
Charlotte, NC
Chattanooga, TN
Columbia, SC
Doraville, GA
Florence, AL
Fort Lauderdale, FL
Greensboro, NC
Greenville, SC
Hattiesburg, MS
Jackson, MS
Jacksonville, FL
Kingsport, TN
Knoxville, TN
Lexington, KY
Louisville, KY
Macon, GA
Memphis, TN
Miami, FL
Middlesboro, KY
Mobile, AL
Montgomery, AL
Nashville, TN
Orlando, FL
Paducah, KY
Raleigh, NC
Savannah, GA
Tampa, FL

Region V
(CHICAGO, IL)

Chicago (Downtown), IL
Chicago, (South), IL
Chicago RHO, IL
Cincinnati, OH
Cleveland, OH
Columbus, OH
Dayton, OH
Detroit, MI
Evanston, IL
Evansville, IN
Flint, MI
Fort Wayne, IN
Grand Rapids, MI
Indianapolis, IN
Lansing, MI
Milwaukee, WI
Minneapolis, MN
Peoria, IL
Southfield, MI

Region VI
(DALLAS, TX)

Albuquerque, NM
Alexandria, LA
Dallas (Downtown), TX
Dallas (North), TX
Fort Smith, AR
Fort Worth, TX
Houston, TX
Little Rock, AR
McAlester, OK
New Orleans, LA
Oklahoma City, OK
San Antonio, TX
Shreveport, LA
Tulsa, OK

Region VII
(KANSAS CITY, MO)

Brentwood, MO
Des Moines, IA
Kansas City, MO
Kansas City RHO, MO
Omaha, NE
St. Louis, MO
Wichita, KS

Region VIII
(DENVER, CO)

Billings, MT
Denver, CO
Fargo, ND
Salt Lake City, UT

Region IX
(SAN FRANCISCO, CA)

Downey, CA
Fresno, CA
Honolulu, HI
Long Beach, CA
Los Angeles(Downtown),CA
Los Angeles (West), CA
Lynwood, CA
Oakland, CA
Pasadena, CA
Phoenix, AZ
Sacramento, CA
San Bernardino, CA
San Diego, CA
San Francisco, CA
San Jose, CA
San Rafael, CA
Santa Ana, CA
Santa Barbara, CA
Tucson, AZ

Region X
(SEATTLE, WA)

Eugene, OR
Portland, OR
Seattle, WA
Spokane, WA

National HO,
Arlington, VA

As of November 1982

PREPARED STATEMENT

OF

HONORABLE ELMO B. HUNTER
UNITED STATES DISTRICT JUDGE
FOR THE
WESTERN DISTRICT OF MISSOURI

AND

CHAIRMAN
OF THE
COMMITTEE ON COURT ADMINISTRATION
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

ON

JUDICIAL REVIEW OF VETERANS BENEFITS CASES
AND THE AWARD OF ATTORNEY'S FEES

JULY 21, 1983

Mr. Chairman and distinguished members of the Committee, I appreciate this opportunity to respond to your request for the views of the Judicial Conference of the United States on the question of vesting the United States District Courts or Courts of Appeals with jurisdiction to review veterans' benefits cases. I appreciate this opportunity to present written views, and I regret my inability to appear in person; prior commitments, however, preclude my personal appearance.

Background

Under section 331 of Title 28, United States Code, the Judicial Conference of the United States is the policy-making body for the Judicial Branch of government. While the structure of federal court adjudicative forums is well-known — the district (trial) courts, the courts of appeals and the Supreme Court of the United States — the structural arrangement for the administration of the Judicial Branch is not well known. The Judicial Conference, chaired by the Chief Justice of the United States, is composed of the chief judges of the circuit courts of appeals and a district judge from each of the regional circuits. Accordingly, the Conference is composed of twenty-six judges from around the country who represent every level of the Judicial Branch. As members of the Judicial Conference, they serve as administrators and formulators of policy, not as members of a tribunal. The Judicial Conference establishes administrative policy for the court system and files recommendations with Congress concerning changes in law that impact upon the judiciary's ability to serve the public efficiently and economically.

The Judicial Conference utilizes a committee structure, not unlike Congress', to evaluate administrative problems and policies and to evaluate legislation in response to Congressional requests. We consider numerous legislative proposals each year and we recommend what we believe to be the best approaches to be taken with regard to organization, jurisdiction, procedure and administration of the federal judiciary. The Committee on Court Administration, which I chair, has a variety of responsibilities to the Judicial Conference, not the least of which is overseeing the jurisdiction of the federal courts. My committee has a specific subcommittee composed of nine federal judges to carry out that responsibility.

Most often, requests for comments on legislation affecting the federal courts are made by the House and Senate Judiciary Committees. They are the Committees with principal legislative and oversight authority and responsibility for the Judicial Branch of government. We also welcome your Committee's concern for the administration of justice, and will work with you when you request our views, as you have now.

On a personal note, I should say that I have been a United States District Judge since 1965, have served on the Court Administration Committee of the Judicial Conference since 1969, and have chaired that Committee since 1978.

Judicial Review of Veterans' Benefits Cases

Let me now turn directly to the subject at hand. The ever increasing authorization of judicial review under specific statutes — without reference a concerted theory of judicial review — greatly concerns the Judicial Conference. The Conference is also very concerned about the subsidiary pattern of piecemeal erosion of the "American Rule" concerning attorneys' fees — the general "rule" that each party must bear the costs of legal assistance. Substantial judicial resources must be committed to specific requirements and interpreting ambiguous nuances of each statute.

The specific question of vesting jurisdiction in the United States courts for reviewing cases involving the provision of veterans' benefits has been discussed for many years. Throughout the discussion, the answer consistently given the question has been negative. Many have argued, including the Veterans Administration, that to provide an adversarial method of decision-making beyond the Board of Veterans Appeals would drive a wedge between the Veterans Administration and the men and women they serve. This may or may not be so. I will defer to more qualified opinions on that matter. The concerns of the Judicial Conference are limited to the administration of the adversary process of dispute resolution under the Constitution and statutes of the United States. Our business is case by case adjudication of individual rights, not the routine internal administration of agencies of the Executive Branch of government. We firmly believe that internal policy matters concerning Executive Branch administration are not within the province of the Judicial Conference. Our concern is therefore limited to whether the federal court system can effectively handle the caseload that would be created by legislation that is currently before the House.

Twenty years ago, in 1963, the Judicial Conference initially disapproved of legislation to provide for the judicial review of decisions of the Administrator by the United States District Courts. The Conference then recommended that that review be vested in a special Executive Branch tribunal. Conf. Rept. March, 1963, p. 18. This position was reaffirmed by the Conference in 1978. Conf. Rept. March, 1978, p. 9. Constantly increasing caseloads in district courts, and our belief that it was not practical or desirable to impose additional case filings involving veterans appeals upon district courts animated our reaffirmation of the position that the review of veterans claims should remain exclusively with the Board of Veterans Appeals or be conferred upon a new Executive Branch, Article I court. Conf. Rept. September, 1981, p. 65. In addition, the Conference noted that imposition of such a caseload on district courts would have a consequential impact upon the courts of appeals and, ultimately, upon the United States Supreme Court.

We still believe that, if Judicial Branch review is deemed desirable by Congress, that judicial review should be limited to the review of constitutional issues and questions of statutory interpretation. That fundamental duty is one the courts will always perform, regardless of the burden. This view was again reaffirmed last fall. Conf. Rept.

September, 1982, p. 65. The Judicial Conference emphatically recommends, however, that legislation that would impose repetitive review of factual questions concerning the provision of veterans benefits upon the district courts not be enacted. The provision of judicial review of factual determinations of the Veterans Administration would pose a substantial new burden for the district courts and at the same time would undermine the fact-finding process within the Veterans Administration. If appellate review of "limited decisions" of the district courts is authorized, it should be based upon the same procedures and venue as presently provide for review of decisions of the United States Tax Court. See. 26 U.S.C. § 7481 et seq. In this manner, factual determinations of the Veterans Administration would be accorded proper finality. Only questions of interpretation of statutory and constitutional law would be subject to review.

The Department of Justice and the Veterans Administration have estimated, at various times, that judicial review of denial of veterans claims would result in 4,080 to 4,600 new cases in the district courts each year. Estimates have been based upon the assumption that appeals from the Board of Veterans Appeals to the district court would parallel our workload experience with Social Security Act cases. Significantly, however, while the legislation that has been historically proposed to grant judicial review of veterans claims has been patterned on review of Social Security Act cases, there are substantial differences between the two. We believe the estimates have been both low and inaccurate.

First, we should note that Social Security cases rose 31% in reporting year 1982 over the previous reporting year. There is substantial fluctuation in this caseload, reflecting legislative and administrative policies.

Second, the review of Social Security Act cases has been authorized for many years, and the administrative adjudicators have become somewhat attuned to the limitations imposed by judicial review and the requirements that judicial review imposes. The Veterans Administration concedes that there are certain additional costs involved in the administration of the Board of Veterans Appeals, due to increased requirements of explanation of the factual record and the reasoning that underlies each decision. These new requirements will only be accommodated with time. In the meantime, the number of cases that might be remanded by the courts for want of a record sufficient to support a decision — under any standard imposed by statute — may be fairly assumed to be higher than normal. This may fairly be considered a "start-up" cost of judicial review. It is still a real cost in both administrative and judicial resources.

Third, the costs of a "case" are multiplied by the number of times that an appeal is brought and remanded. In one bill currently pending before the House, a case may be remanded at the request of the Administrator at any time before an answer is filed. This remand on request may merely tie up court clerks' time with handling a case that may never be adjudicated. In addition, remand may be had for want of necessary factual determinations and, in the end, for reconsideration. This administrative/judicial tennis game will serve neither the administrative nor judicial systems well.

Finally, on this point, I should note that increases in the size of the federal judicial system do not necessarily parallel increased workloads in the courts. Every two years the Judicial Conference surveys the need for additional judgeships. We currently have pending before the Congress requests for 51 additional district court judgeships and 24 additional court of appeals judgeships from our 1980 and 1982 surveys. Even if we assume that the Veterans Administration's caseload estimates are correct, we should not assume that any consequential additional judgeships will be required as single judgeships in particular districts or that Congress will be forthcomming in creating needed new judgeships. If past is prologue, it may be years before stresses created by providing judicial review over veterans claims will be accomodated. At the same time, constant growth in the judicial system is highly undesirable in its own right. The traditional managerial concepts of span of control and chain of command may have already reached their limits. Pending legislation before the House and Senate Judiciary Committees recognize that reality.

Let me now turn to substantive, non-workload related reasons for our objections to broad authorization of judicial reivew of veterans claims in the Judicial Branch. Federal Judicial Branch growth and development has not been the singular province of the House and Senate Judiciary Committees for many years, and the result has been an unstructured — and often contradictory — growth in the jurisdiction of the federal courts. Proposals for the creation of Article I Executive Branch courts to review Social Security cases, immigration cases and other governmental benefits have acknowledged the panoply of inconsistent standards for judicial review of agency actions and have manifested an effort to fashion a more uniform policy approach to wisely "spending" Judicial Branch resources. The Judicial Code was last recodified in 1948, and a review of its provisions illustates a lack of uniform codification theory even then. For the branch of government that is principally devoted to the adjudication of cases and controversies involving fundamental rights, inconsistency and contradition in law are major impediments to effeciency and economy. We must suggest to you, as we have innumerable times to others, that the lack of a unified policy for judicial review is a great source of inconvenience and concern — not only to judges, but to the litigants, attorneys, and members of the Judiciary and Appropriations Committees of Congress.

In addition, Judicial Branch review may not be purely beneficial to veterans; it may well be very costly. First, assuming sweeping, rather than limited, jurisdiction were to be vested in the district courts, and assuming that the veteran is successful there, there will be some delay in any award of benefits. In reporting year 1982, the median time from filing to disposition in United States cases in the district courts was fourteen months. If a veteran feels aggrieved by a decision of the Board of Veterans Appeals, this period of delay for review of a small claim may really not be in the veteran's best interest. No priority should be given to veterans claims, or any other class of cases, due to the unmanageable plethora of statutory priority provisions that already exist throughout the federal code. Thus, whatever may be the perceived benefits of providing for broad Judicial Branch review of veterans claims, the time involved may well be costly for the veteran.

Accordingly, the Judicial Conference recommends against a sweeping authorization for district court judicial review of veterans claims. In the alternative, we suggest that, if Congress believes such judicial review is desirable, that such judicial review be limited to review of the statutory and constitutional interpretation. Review should be had either in the district courts on the limited basis of reviewing the record, or in the courts of appeals under venue similar to review of the decisions of the United States Tax Court.

Attorneys' Fees

A subsidiary issue that arises is the issue of whether attorneys' fees should be awarded. An example of this can be found in the bill passed by the Senate earlier this year and now pending before the House.

The general rule — often referred to as the "American Rule," because the courts long ago decided to differ from the common law of England — is that each party is responsible for the payment of his or her own attorneys' fees. In short, while court costs may be taxable against the losing party, even the successful litigant will usually be required to absorb the costs of counsel. Many bills that would now grant jurisdiction to the courts also change this rule insofar as litigation arising under the particular statute.

The Judicial Conference has for many years cautioned against this piecemeal erosion of the American Rule. If the Congress wishes to change the scope of taxable costs and fees in federal court litigation, that change should be made as a fundamental change of policy, not implemented through piece-by-piece disintegration of the American Rule. Accordingly, we have suggested, on several occasions, that Congress review the entire question of taxation of attorneys' fees and establish a uniform policy.

Today the Equal Access to Justice Act, 28 U.S.C. S 2412(d), provides that attorneys' fees may be awarded against the United States, if the court determines that the position asserted by the United States was not "substantially justified", to an individual with a net worth not exceeding $1,000,000 or an organization with a net worth not exceeding $5,000,000. Even with this general provision, due to expire on September 30, 1984, there are substantial problems of interpretation and substantial "satellite" litigation has arisen. First, the court must determine whether a party has "prevailed" against the United States. Second, the court must determine whether the position of the United States was "substantially justified". Third, the court must determine the net worth of the individual or organization in order to determine whether the individual or organization is eligible to demand attorneys' fees. Thus, this most general, as well as many different specific provisions, create a significant workload of their own.

The creation of a separate attorneys' fees award under a new grant of judicial review over veterans claims will create even more satellite litigation. The Veterans Administration, in an understandable assumption that litigation losses will not incur substantial attorneys' fees awards, has not estimated either the administrative or judicial costs. We are convinced, however, that there may well be substantial increased costs in terms of satellite litigation to the judicial system. Indeed, we may fairly speculate that, at the beginning at least, the possibility of an award of attorneys' fees will become an incentive to litigation — particularly where there is no disincentive from the threat of an award of attorneys' fees against an unsuccessful plaintiff.

In addition, if we assume that jurisdiction is provided in the district courts, that a veteran is successful in a suit, that court costs will be automatically taxed and that the veteran may apply for attorney's fees, we are not free to assume he will emerge from the exercise as he anticipated he would. Historically, awards of attorneys' fees have been substantially less than the actual cost of counsel. Even a successful litigant who is awarded a reasonable attorneys' fee will ultimately incur additional costs. How much the attorneys' fees, and subsidiary non-taxable costs of the litigation, will actually reduce an award of veterans benefits is difficult to estimate for the average case, but we may fairly assume that even successful litigants seeking veterans benefits will complete the process with less than that whic they expected.

Accordingly, we urge Congress to consider the question of awards of attorneys' fees on a much broader policy ground. We recommend a general rule, rather than continued piecemeal erosion of the American Rule that has guided the courts for so long.

Conclusion

The Judicial Conference of the United States does not recommend the authorization of comprehensive or broad Judicial Branch review of veterans claims. A broad grant of judicial review will unnecessarily burden already overcrowded court dockets with repetitious review of factual determinations. If Congress ultimately determines that Judicial Branch review is desirable, that review should be limited to the record of the Board of Veterans Appeals and questions involving constitutional and statutory interpretation. Any grant of judicial review places not only a caseload strain upon the courts; it also must be considered in light of the overall theory of Judicial Branch review and the realities of economy and efficiency that influence resource allocation.

In addition, if even limited judicial review is to be provided, the question of awarding attorneys' fees should receive more comprehensive consideration. The Judicial Conference believes that a uniform policy on attorneys' fees is far more desirable than the continued piecemal erosion of the American Rule.

September 29, 1983

Mr. Lee Beck, General Counsel
Legislative Affairs
Administrative Office of the
  U.S. Courts
Washington, DC   20544

Dear Mr. Beck:

As you know, the Subcommittee on Oversight and Investigations held a July 21, 1983, oversight hearing on the issue of judicial review of veterans' claims. At that hearing, the Department of Justice was asked to provide the Subcommittee an estimate of the cost of providing judicial review. Their response is enclosed for your information.

In order for the Subcommittee to have the most complete information possible, it is requested that the Administrative Office of the U.S. Courts prepare an estimate of the cost of judicial involvement in the veterans' claims process.

The hearing record will soon be ready to print; consequently, we would like to have the estimate as soon as possible. If the information is not received in time for publication, we will, of course, retain it in the permanent files of the Committee.

Sincerely,

G. V. (SONNY) MONTGOMERY
Chairman

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS**
WASHINGTON, D.C. 20544

WILLIAM E. FOL
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WILLIAM JAMES WELLER
LEGISLATIVE AFFAIRS
OFFICER

OCT 20 1983

October 13, 1983

Honorable G. V. Montgomery
Chairman
Committee on Veterans' Affairs
335 Cannon House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

Thank you for your letter of September 29, 1983, requesting the views of the Administrative Office on the costs that would be incurred if Congress provided for judicial review of veterans' benefits cases. Based on the assumptions stated below, and the Department of Justice's suggestion that 4,100 cases would be filed, we estimate the cost to be approximately $5,634,000 in the first year for the requsite new judgeships and a recurring cost of approximately $4,424,000 each year thereafter.

Any estimate of costs associated with a new provision for judicial review must ultimately rest on the scope of review to be provided and the forum designated for that review. There must be a strong nexus between these two elements or costs will be greatly increased by the fact that judges will be required to perform functions that are not traditionally performed as a part of their duties.

The Department of Justice suggested in their letter to you, dated September 26, 1983, that they envision approximately 4,100 additional cases arising under a proposed arrangement for judicial review of veterans' benefits claims. We believe this estimate is based on the judicial review rate of Social Security Act cases in the district courts. We note that this estimate comports with past estimates made by the Department of Justice. We also note that in the reporting year ending June 30, 1983, Social Security Act cases rose 58.6% over last year.

If we accept the Social Security Act model of review and caseload, utilizing raw, unweighted cases, the caseload would suggest a possible need for at least ten additional district court judgeships in addition to the present corps of judges and over and above the 51 district court judgeships previously requested by the Judicial Conference. We cannot, however, anticipate that veterans' benefits claims will parallel Social Security Act cases, and thereby assign the appropriate weighting developed by the 1979 Federal District Court Time Study to such district court case filings. Certain non-quantifiable factors, such as the relative inexperience of counsel with the statute (as contrasted with a well refined Social Security Act practice) and the lack of precedent for the determination of jurisdictional, procedural and substantive issues must be recognized. Additionally, we cannot project the distribution of this caseload among the district courts. We, therefore, must project on the basis of the nationwide caseload, rather than weighted load per district. We are also apprehensive that the assumption that 4,100 cases would be filed is low; at least in the first years of litigation under any new provision, the actual number of persons who feel aggrieved will be significant. Other factors, such as incentives to litigate caused by provisions for the shifting of attorneys' fees to the government, will further increase the amount of litigation. Nonetheless, utilizing this conservative estimate of 4,100 raw cases, and assuming that the Judicial Conference would request and Congress would authorize the necessary additional judgeships, an appropriation of $4,380,000 would be required in the first year to establish staffing and facilities and $3,320,000 would be required each year thereafter to maintain these judgeships. These figures do not include clerks' office functions that would require an additional 44 deputy clerks based on the work measurement formula for district court clerks' offices approved by the Judicial Conference in March, 1982. This would result in an additional cost of $1,254,000 in the first year and $1,104,000 each year thereafter.

Consequent costs in terms of appeals filed in the United States courts of appeals cannot be reasonably estimated. Caseloads and costs in the courts of appeals cannot be reduced to a quantifiable form based on assumptions about the filings in the district courts. Vesting review directly in the courts of appeals, on the record, with an appropriate appellate standard of review, would be even more expensive in terms of direct costs.

Finally, we should note that the court system is already overburdened. The Judicial Conference has previously requested that Congress authorize 51 additional district court judgeships and 24 court of appeals judgeships based on 1980 and 1982 Biennial Judgeship Surveys. The 1984 Survey has already begun, and caseload indicators suggest that additional judgeships may be requested. The judicial system cannot continue to grow in deference to mounting caseloads; the system has already reached the limits of elemental management concepts of span of control and chain of command. Accordingly, the Judicial Conference has long advocated such measures as repeal of diversity of citizenship jurisdiction and has recommended against the enactment of additional jurisdictional provisions unless a clear need has been illustrated. We do not believe that a clear and convincing case has been made for judicial review of veterans' benefits claims, and, indeed, continue to be of the view that provision of judicial review will ill serve the veterans themselves.

Sincerely,

Leland E. Beck

Leland E. Beck
Counsel

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